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Supreme Court, U.S.
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No. 98-1670

In the

Supreme Court of the United States

October Term, 1998

ELISA LOZANO, a minor, by and through her guardian ad litem, EFFRAIN LANDEROS; ENRIQUE LOZANO, a minor, by and through his guardian ad litem, EFFRAIN LANDEROS; ENRIQUE LOZANO; THE ESTATE OF MIGUEL LOZANO, by and through its special administrator EFFRAIN LANDEROS,

Petitioners,

v

TOYOTA MOTOR CORPORATION; TOYOTA MOTOR SALES, U.S.A., INC.; TOYOTA OF SACRAMENTO,

Respondents.

On Petition for Writ of Certiorari to the California Court of Appeal, Third Appellate District

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the constitutional validity of California's procedure for remedying discrimination in jury selection ripe for review by this Court, where Petitioners (1) failed to timely object to Respondents' exercise of peremptory challenges or move for relief in the trial court, (2) failed to seek or obtain any finding from the trial court that Respondents acted improperly in the exercise of any of their peremptory challenges, (3) expressly waived any objection to Respondents' exercise of their peremptory challenges, (4) failed to create a record sufficient to support meaningful appellate review of the propriety of Respondents' challenges or demonstrate their impropriety, and (5) failed to raise their 14th Amendment challenge to California's remedial procedure until their Petition for [discretionary] Review to the California Supreme Court (which declined to consider it)?

2. Is the 14th Amendment violated when a state court quashes a venire and empanels a new venire to remedy the discriminatory use of peremptory challenges during jury selection?

LIST OF PARTIES

Petitioners' description of the parties is accurate, with one exception. The Respondent designated as "Toyota of Sacramento" is actually known as "Maita Enterprises, Inc. dba Maita Toyota of Sacramento".

Pursuant to Rule 29.6, Respondents disclose the following information concerning parent companies and nonwholly owned subsidiaries. Respondents understand "nonwholly owned subsidiary" to mean a company located in the United States in which the Respondent has a direct ownership interest greater than 50% and less than 100%. Respondents understand "parent company" to mean a company which has a direct ownership interest of more than 50% in the Respondent.

Maita Enterprises, Inc. dba Maita Toyota of Sacramento has no parent company and no nonwholly owned subsidiaries.

Toyota Motor Sales, U.S.A., Inc.'s parent company is Toyota Motor North America, Inc. It has the following nonwholly owned subsidiaries located in the United States:

TRD U.S.A., Inc.

Toyota Motor Corporation has no parent company. It has the following nonwholly owned subsidiaries located in the United States:

Toyota Technical Center, U.S.A., Inc.
Calty Design Research, Inc.

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SUMMARY OF ARGUMENT

1. Petitioners conduct below makes this Petition inappropriate. Though Petitioners threatened a state law motion pursuant to *People v. Wheeler*, 22 Cal.3d 258, 148 Cal.Rptr. 890 (1978) ("*Wheeler*") challenging the propriety of Respondents' peremptory challenges of minority jurors in the trial court, they declined to assert the motion and expressly waived any objection on the record. Consequently, Petitioners never presented to the trial court a *prima facie* case of discrimination; failed to request that Respondents explain the bases of any of their challenges; and failed to obtain any reviewable finding by the trial court that there had been any discrimination in jury selection. The Petition necessarily assumes, without basis, that there was discrimination, or asks the Court to overlook the absence of discrimination and render an advisory opinion striking down California's remedial procedure. Because Petitioners waived any objections to Respondents' exercise of peremptory challenges, under California law, the judgment rests on an independent and adequate state ground.

2. At no time in the trial court or in the Court of Appeal did Petitioners contend that the California procedure for remedying discrimination in jury selection was constitutionally infirm. Rather, they merely asked the courts to change California law because the remedy of re-seating the already excused jurors, practiced in the federal courts, was the "better rule". It was not until their Petition for Review to the California Supreme Court that Petitioners suggested that the California remedy for discrimination violated the 14th Amendment, or any other constitutional provision. The California Supreme Court declined to review the Court of Appeal's unpublished opinion, including the tardily-raised

constitutional argument now presented to this Court. Rule 29(b) of the California Rules of Court states that the California Supreme Court will normally not consider, as a matter of policy, "any issue that could have been but was not timely raised in the briefs filed in the Court of Appeal." Under these circumstances, Petitioners failed to properly present or preserve their constitutional challenge, and it is not appropriately considered by this Court.

3. By contending that the 14th Amendment requires state courts to "authorize" reseating of a juror because the alternative remedy of striking the venire is constitutionally inadequate to protect the rights of litigants and excluded jurors, Petitioners necessarily condemn as unconstitutional any state court ruling striking a venire in response to a finding of discrimination. If that remedy is inherently insufficient to adequately protect the rights of litigants and prospective jurors, then its use would presumably be unconstitutional. That position was necessarily rejected in *Batson v. Kentucky*, 476 U.S. 79 (1986), where this Court concluded that the 14th Amendment did not require any particular remedy and that quashing a venire and beginning jury selection anew was a permissible remedy for the discriminatory exercise of peremptory challenges. 476 U.S. at 99 n. 24.

If Petitioners are correct, then *Batson* was not, and the numerous states that have adopted quashing of the venire as an appropriate remedy are consistently violating the 14th Amendment and entering tainted judgments. But nothing in the 14th Amendment compels a court to re-seat a juror who was improperly challenged, just as nothing in the 14th Amendment requires a court to prevent discriminatory challenges at all in the absence of a procedurally proper

objection and request by a party to do so. The 14th Amendment does not compel the states to adopt any particular procedure to remedy discrimination in jury selection; it only requires that some meaningful remedy be provided if a timely objection is made and is, or should have been, sustained.

STATEMENT OF THE CASE

A. Procedural Overview

Petitioners, Plaintiffs below, filed this action under California law for damages arising from an automobile accident, alleging that the accident and the injuries in the fuel fed fire were caused by steering, seatbelt, and fuel system defects in a 1988 Toyota Van sold by Respondents, Defendants below. After a lengthy trial, the jury found that there was no defect in the Van, nor any breach of the implied warranty of the merchantability. Petitioners' Motion for New Trial was denied and Judgment was entered for Respondents. The Court of Appeal affirmed in an unpublished opinion. The California Supreme Court denied discretionary Review.

As we explain in detail below, the sole issue raised by Petitioners in this Court — their contention that the California remedy for a finding of discrimination in the exercise of peremptory challenges during jury selection violates the 14th Amendment — was never raised in any form or forum until Petitioners unsuccessfully sought discretionary review to the California Supreme Court. Rather, in the trial court and in the Court of Appeal, Petitioners argued only that California law should be changed because the remedy applied by federal courts was the "better rule."

In any event, Petitioners failed to timely object and move for relief in the trial court — indeed, they *never* lodged an objection or moved for relief, and they *expressly waived any challenge to the conduct of jury selection on the record.* Thus, there was no finding of discrimination for the California Court of Appeal to review, no discrimination for the California courts to remedy, and no remedial issue for the California courts to decide. It was under these circumstances that the Court of Appeal "decline[d] [Petitioners'] invitation" to change California Law. Appendix (App.) B, Opinion at 4 Given the state of the record, this Court should do the same.

B. Petitioners Waived Their Challenge to Respondents' Exercise of Peremptory Challenges By Expressly Waiving Their Objection on the Record, and By Failing to Timely Lodge an Objection, Present a Motion or Otherwise Create a Record Demonstrating Discrimination in Jury Selection

During jury selection, Petitioners threatened a *Wheeler* motion each time Respondents struck a juror who happened to be a member of a minority group, regardless of the juror's particular ethnicity or the apparent, objectively reasonable individualized reasons for the challenge. App. E 2, 12, 15-16; Supplemental Appendix (Supp. App.) 35b, 38b-39b[1] Just before the panel was to be sworn, *and after all of the challenged jurors had been excused*, out of an abundance of caution and concern for judicial economy, the trial court asked Petitioners to finally decide if they were making the threatened *Wheeler* motion. Petitioners declined to pursue the motion. The trial judge expressly advised Petitioners' counsel that he would consider any objection to the jury waived if they declined to make a motion. So advised, the Petitioners *expressly waived the issue* and the jury was sworn. App. E 17-26, 28-29, 32-40

Though Petitioners claimed in the trial court, and again on the appeal, that they were afraid to make the motion

[1] To avoid duplication, Respondents include in the Supplemental Appendix (Supp. App.) only those portions of the Reporter's Transcript cited which are not included or not completely included in Petitioners' Appendix (App.), with minor overlap in the interest of continuity. All cited pages in the Reporter's Transcript are thus located in either the Appendix E to the Petition or Supplemental Appendix A to this Opposition.

because they did not desire the remedy afforded for unconstitutional challenges under California law, they made no effort to create a record sufficient to establish any constitutional violation or to preserve the issue for meaningful appellate review. They made no offer of proof describing the facts which supported an inference of discrimination; they did not ask the trial court to require Respondents to explain or justify their challenges; they did not ask the trial court to make a finding that Respondents had discriminated, except to briefly suggest that the trial court schedule a contempt hearing "in due course" and at a "later time." Supp. App. A 45b-51b Petitioners never formalized their request and a contempt hearing was never held, and no finding of discrimination ever issued.

Accordingly, Petitioners' claim of discrimination presented on appeal was based entirely on their extreme liberties with the record, including the unsupported and improper assumptions that the trial court (1) had found that Respondents had engaged in discriminatory conduct, (2) had rejected Respondents' unstated (and unrequested) justifications for the challenges, and (3) was prepared to grant the motion without more, all in patent violation of firmly-established California procedure. *See Wheeler*, 22 Cal.3d at 280-282. The Court of Appeal properly found it inappropriate on this record to entertain Petitioners' invitation to modify California remedial law. App. B, Opinion at 3-4 Petitioners' request that this Court reach out and strike down California law in a case without a record demonstrating any discrimination is at least equally inappropriate.

C. Petitioners Waived Their Constitutional Challenge To California's Remedial Procedure By Failing To Timely Raise It Below

The constitutional issue presented in the Petition -- whether the California remedy under *Wheeler* for discriminatory conduct in jury selection itself violates the 14th Amendment -- was never raised in the trial court or the Court of Appeal. Petitioners briefly and vaguely argued that the remedial rule followed by the federal courts in federal trials was "probably the better rule", but they never claimed the longstanding California remedial rule was unconstitutional. App. E 33-35

D. Misrepresentations in the Petition

Petitioners make a series of material misrepresentations in the Petition. First, they misrepresent the record concerning Respondents' use of their peremptory challenges. Second, they misrepresent the events in the trial court when they (1) state that they "objected" to Respondents' use of their peremptory challenges, (2) state that in response the trial court impliedly "found" that Respondents had discriminated, (3) state that the trial court formally proposed to remedy the situation by empaneling a new jury, and (4) state that Respondents had acquiesced in the quashing of the venire and conceded that they had in fact discriminated.

At page 2 of the Petition, Petitioners claim that "Toyota exercised four of its five peremptory challenges to exclude hispanic and black jurors." They made the same unsupported assertion to the Court of Appeal, Supp. App. C,

Appellants' Opening Brief (AOB) 62b, which Respondents challenged, Supp. App. E, Respondents' Brief (RB) 75b. The Court of Appeal's review of the record led it to agree that Respondents had challenged "a Black woman, two Hispanic women, and two whites." App. B, Opinion at 5 Though Petitioners filed a Petition for Rehearing in the Court of Appeal, they did not challenge the factual statement in the opinion. Under California law, the factual statement of the Court of Appeal under these circumstances is binding on the parties on further review. California Rules of Court, Rule 29(b).

Seeking to avoid the consequences of their failure to make a reviewable record which would support a conclusion that Respondents had discriminated in the jury selection process, Petitioners repeatedly mischaracterize and distort the record. There was no "objection" by Petitioners to Respondents' use of their peremptory challenges; there was no "finding" by the trial court that Respondents were guilty of discrimination in jury selection; there was no "offer" to impose the California remedy of striking the venire; there was no "concession" by Respondents that they had discriminated; and Respondents did not "acquiesce" to the striking of the venire. *See* Petition at 2-5 & n.2. Each of Petitioners' contrary statements is a product of blatant overreaching, made possible only by Petitioners' failure to properly invoke the *Wheeler* procedure and develop an adequate record for review of their accusations. Unfortunately, to properly correct the record requires extended analysis of the proceedings in the trial court.

1. Jury Selection Proceedings

Soon after jury selection began, Petitioners began their effort to interfere with Respondents' legitimate exercise of their peremptory challenges. Respondents excused Mary Lopez-Garcia. She had unsuccessfully sought a hardship exclusion, Supp. App. A 2b-3b, 18b-19b, 27b-29b, 31b-34b, and had experienced steering problems and jammed seat belts in her van, issues similar to Petitioners' theories of defect. Supp. App. A 5b-7b, 23b-26b, She had also confessed that she gets very emotional when children are injured, and expressed some concern over her ability to put sympathy behind her. Supp. App. A 11b-15b Petitioners advised the trial court that they "anticipated some question" as to the appropriateness of Respondents' motivation for challenging any hispanic jurors. App. E 2 But they did not make a motion, and did not ask that the challenge be denied. Juror Lopez-Garcia was excused. App. E 5

With their third challenge, Respondents excused Teri Austin, a black juror. App. E, 9 She had lost a friend in an accident involving a fire. Supp. App. A 9b-10b Petitioners did not immediately object, move for relief, or ask that the challenge be denied. Long after she had been excused, however, Petitioners stated that they wanted the record to reflect that Austin had been Respondents' second challenge of an individual in "readily identifiable racial classes." They added, however, that they "don't want to move for relief without an opportunity to consult with our jury consultant." The Court noted there is "nothing before me." Respondents offered to respond, if necessary, at the appropriate time. They also observed, however, that they did not want to be intimidated in exercising their challenges. The Court

responded: "Well, don't be then." App. E 12-13; Supp. App. A 35b-36b

Petitioners' threats continued when Respondents excused juror Helen Garcia, a hispanic woman, with their fourth challenge. App. E 15-16; Supp. App. A 38b-39b Garcia had sought a hardship exclusion and was a nurse who had worked in acute care hospitals for 22 years before entering the rehabilitation field. Supp. App. A 1b-2b, 19b-21b Petitioners noted that this was the third "challenge of a suspect group" and "whether or not we ask for relief from the court from these obviously discriminatory challenges which are being made here, it's my opinion that we have an independent cause of action for discrimination. And I -- I want to make that a matter of record." App. E 16; Supp. App. A 38b-39b Juror Garcia was excused without objection. App. E 25-26; Supp. App. A 38b-39b

2. Petitioners' Express Waiver of Any Objection to Respondents' Peremptory Challenges

After both sides exercised further challenges and passed the jury, the Court noted that "we have a jury then." It then asked Petitioners to decide whether they were moving for mistrial, because it was time to empanel the jury. Petitioners said they were not. App. E 17-19 Because it was not familiar with the law in this area, the Court discussed with counsel the appropriate procedure to follow if a *Wheeler* motion was made, and gave Petitioners overnight to research the law concerning waiver and decide whether or not they wanted to object to Respondents' peremptory challenges. At no time did the Court indicate that it believed there had been

any discrimination -- only that it was interested in following the law, empaneling the jury, and judicial economy. App. E 17-22, 28-29

Petitioners did not suggest that the Court disallow any of Respondents' challenges. Indeed, the Court stated that it was "going to excuse those people you've challenged." To which Petitioners replied, "Sure." App. E 22-23 All stricken prospective jurors were then excused. App. E 24-27

The next morning the Court asked Petitioners point blank if they were making the *Wheeler* motion or waiving their objection. Petitioners stated that waiver was a "harsh way of putting it." The Court again advised that it would not waste 10 weeks, adding, "you know, I might entertain a motion for a mistrial, see. *I'm going to put you on the spot.. . . that's my role here.*" App. E 32-33(emphasis added) After further colloquy, with the Court pressing the Petitioners to either move for relief or waive the objection, Petitioners ultimately advised that they were "afraid to make any kind of motion, so let's just proceed." App. E 33-35 The Court responded: "All right then. I'll interpret that to mean that you waive any objection." Petitioners then agreed that the Court should swear the jury, adding that they were still investigating the possibility of filing a supplemental complaint for damages. App. E 38-39 All told, Respondents exercised five challenges. App. E 17

Prior to the swearing of the jury, Petitioners never requested that the Court deny a challenge. The closest they came was when they advised the Court after the stricken jurors had been excused that "the federal courts allow a particular challenge to be denied," but that unless the Court

was interested in changing California law to adopt "the better rule", it did not have that option. App. E 34-35[2]

3. Selection of Alternate Jurors

In selection of alternates, Respondents excused prospective alternate juror Michael Gomez. App. E 44b Gomez had prosecuted a personal injury lawsuit and was currently a plaintiff in a class action personal injury lawsuit. Supp. App. A 41b Petitioners again complained, but declined "to make a motion which would in any way result in a difference in the composition of the jury panel." Supp. App. A 45b-46b Petitioners did not request that the challenge be denied, and they advised the Court that it was appropriate to proceed. Respondents denied any discrimination, but noted that they had no obligation to respond in the absence of a motion and presentation of a prima facie showing of discrimination. Supp. App. A 45b-51b All told, Respondents exercised three challenges to alternate jurors. Supp. App. A 50b, 54b-55b

No hearing was ever held on the question of the propriety of Respondents' exercise of their peremptory challenge. Petitioners did ask the Court to schedule a hearing and hold Respondents in contempt, Supp. App. A 45b-50b, but the issue was never raised again in the trial court. The trial court never asked Respondents to explain or justify a peremptory challenge, and never criticized their conduct in jury selection.

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[2] Petitioners later argued to the Court of Appeal that the trial courts do have that option under certain circumstances, citing *People v. Williams*, 26 Cal.App.4th Supp. 1, 31 Cal.Rptr.2d 761 (1994). Supp. App. C AOB 64b

4. Refutation of Petitioners' Misrepresentations

As the foregoing demonstrates, the transcript does not support, and indeed refutes, Petitioners' representations about the record underlying their Petition.

a. Petitioners Did Not Object to Respondents' Challenges

Petitioners never "objected" to Respondents' exercise of any challenge in the *legal* sense. Critically, they expressly declined to pose a formal objection. Indeed, the trial court told Petitioners that it was interpreting their disclaimer of any motion "to mean that you waive any objection." To which Petitioners responded, "Okay, I jus -- I -- in terms of waiving any objection, I just want to make it clear that I'm still investigating the possibility of filing a supplemental complaint raising this issue." App. E 38-39 Thus, Petitioners stated on the record to the trial court that they were not raising, and indeed were waiving, any objection to Respondents' challenges, except for reserving the possibility of a damages claim in a supplemental complaint or a motion re contempt. Neither materialized.

b. The Trial Court Did Not "Find" Respondents Had Discriminated and Did Not Offer to Quash the Venire

The record does not support Petitioners' characterization of the trial court's rulings, or even off-hand comments, as a "finding" that Respondents had engaged in

any discriminatory conduct in jury selection. Rather, review of the record in context reveals that the trial court was simply pressing the Petitioners to decide whether or not they were *going to object* to any aspect of jury selection, so that the trial could proceed without the threat of a motion for mistrial in what promised to be a lengthy trial. As the trial court explained, it did not "want to waste an entire ten weeks," App. E 17-18, so it "put [Petitioners' counsel] on the spot." App. E 32-33

The record does not yield a reasonable inference that the Court actually found any discrimination or actually determined that Petitioners were entitled to any remedy. Petitioners never made a motion; never presented an offer of proof that Respondents had discriminated; never requested that Respondents be required to explain their reasons for any challenge; and the Court never inquired into Respondents' challenges or criticized their conduct. All of this is flatly inconsistent with the established procedure for determining the existence of discrimination in jury selection. *See Wheeler*, 22 Cal.3d at 278-282. It would be inappropriate and irrational to assume that the trial court simply ignored California procedure and made a finding of discrimination and entitlement to a remedy without receiving any evidence and without a motion or objection ever being presented. Indeed, the required procedure for a *Wheeler* motion had been discussed the afternoon before. App. E 20-21 There is no reason to believe that the trial court simply decided to dispense with due process and California procedure and deem Respondents to have discriminated. Petitioners' representations that the trial court found discrimination and offered to remedy it are disingenuous.

c. Respondents Did Not Concede They Had Engaged in Discrimination

It cannot be legitimately argued that Respondents conceded they had discriminated. Respondents expressly denied engaging in any acts of discrimination, and each of their challenges was well-supported by *individualized* tactical reasons. In portions of the transcript conspicuously omitted by Petitioners from the appendices to their Petition, but included in Respondents' Supplemental Appendix, Respondents specifically denied any discriminatory intent. Supp. App. A 49b Far from admitting any discrimination, Respondents repeatedly advised the Court that they were ready and willing to explain their challenges, if a motion and a *prima facie* showing was made. App. E 4-5, 13; Supp. App. A 35b, 49b But Petitioners declined to make the motion.

d. Respondents Did Not "Acquiesce" in the Quashing of the Venire

Nor is there any support for Petitioners' claim that Respondents acquiesced in the striking of the venire. Respondents' oft-repeated and indisputably correct position was that no relief was appropriate in the absence of discrimination, and no defense of their challenges was even necessary in the absence of a motion. The comments Petitioners seize upon to imply acquiescence are, viewed in context, plainly efforts to make a record that any objections to

jury selection would be waived if not made before the jury was sworn.

WHY THIS WRIT SHOULD BE DENIED

1. *A Firmly Established and Regularly Followed State Procedural Rule Barred Review of Petitioners' Claim By the California Supreme Court*

Under 28 U.S.C. § 1257, Supreme Court review extends only to questions of federal law raised in compliance with state procedural rules governing the preservation of issues for appeal. *See Ford v. Georgia*, 498 U.S. 411, 423 (1991). Review of a federal law issue raised in this Court is foreclosed when the decision of the state court rests on a ground independent of the federal issue and adequate to dispose of the case. Supreme Court Rule 14.1(g)(i) implements this limitation by requiring the Petitioner to specify in the Statement of the Case the stages of the proceedings where the federal questions in the Petition were raised in the trial court and the courts of appeal, the method or manner of raising them, and the way in which they were passed on by the courts.

It is not surprising that Petitioners have violated this Rule. To comply with it would have terminated their Petition at the very threshold and revealed its frivolous nature. The issue was never raised in the trial court or the Court of Appeal. It was raised for the first time in the Petition for Review to the California Supreme Court. California appellate courts generally will not entertain issues not raised in the court below, including claims of discrimination in the exercise of peremptory challenges. *People v. Hayes*, 52 Cal.3d 577, 605, 276 Cal.Rptr. 874 (1990), *cert. denied*, 502

U.S. 958 (1991). California Rule of Court 29(b) expresses and codifies the policy of the California Supreme Court to decline to review issues not raised in the briefs to the Court of Appeal. Consistent with that Rule, the Supreme Court of California declined to decide the newly raised federal issue, as it was never presented to the lower California courts. The California Supreme Court's failure to address the issue under these circumstances is presumed to have been due to Petitioners' improper presentation. *Street v. New York*, 394 U.S. 576, 582 (1969). Under these circumstances, this Court lacks jurisdiction to consider the issue. *See Exxon Corp v. Eagerton*, 462 U.S. 176, 182 (1983).

Failure to comply with firmly established and regularly followed state procedural rules resulting in refusal of the state Supreme Court to hear the case precludes review in this Court. *Ford*, 498 U.S. at 423-424. For these reasons, the federal question raised in the Petition is not reviewable.

2. *To the Extent They Were Raised and Adjudicated, Petitioners Claims Were Raised and Adjudicated Under the California Constitution and California Procedural Law*

Petitioners have consistently described the motion they considered, but opted not to assert, as a *Wheeler* motion, and the Court of Appeal understood that to be the issue Petitioners were asserting on appeal. App. B, Opinion at 4-7. Petitioners did not cite *Batson v. Kentucky*, 476 U.S. 79 (1986) or its progeny, or the 14th Amendment, or even the 6th Amendment, to the trial court or the Court of Appeal. The Court of Appeal Opinion cited no federal law, and limited its discussion to *Wheeler* and its progeny and Petitioners' tactical decision to not make a *Wheeler* motion.

The issue decided in *Wheeler* was whether discriminatory use of peremptory challenges denies the right to trial by an impartial jury guaranteed by the California Constitution, 22 Cal.3d at 263, which the Court interpreted to include the right to have the jury drawn from a representative cross-section of the community. *Id.* at 266. The Court held that the use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates article I, section 16 of the California Constitution. *Id.* at 276-277. The Court specifically rejected existing federal 6th Amendment law as insufficiently protective, and concluded that claims for group bias are to be governed by the California Constitution. *Id.* at 287. *See Batson*, 476 U.S. at 82 n.1 (citing *Wheeler* as an example of a state court "construing [its] State's Constitution" analog to the 6th Amendment).

Thus, Petitioners not only failed to raise before the California trial court and Court of Appeal the specific federal issue they raise in the Petition — whether California's procedure for remedying discrimination in jury selection violates the 14th Amendment — they failed to raise *any* federal issue at all. In deciding what remedy was available in California pursuant to a successful *Wheeler* motion, the courts were considering the appropriate remedies California provides for violations of the California Constitutional guarantee of the right to trial by jury. Petitioners never raised and the California courts never decided any issue related to the 14th Amendment or even the 6th Amendment, decided the case solely on state law grounds, and were entitled to do so because Petitioners never invoked federal law. The predicate decisions sought to be reviewed therefore rest entirely on independent and adequate state grounds, both procedurally (see above) and in the underlying substance.

Under these circumstances, review of the federal issue belatedly raised by Petitioners would be inappropriate. *New York Central & R. Co. v. New York*, 186 U.S. 269, 273 (1902).

3. *Petitioners Failed to Preserve the Issue of the Propriety of Respondents' Exercise of Peremptory Challenges Under the Specific Standards Set Forth in Ford v. Georgia and Trevino v. Texas*

Petitioners' argument is also unreviewable because it fails to comply with the specific standards adopted by this Court for preservation of *Batson* claims. In *Ford v. Georgia*, 498 U.S. 411 (1991) and *Trevino v. Texas*, 503 U.S. 562 (1992) this Court addressed the sufficiency of the steps taken to preserve equal protection objections to race-based use of peremptory challenges in the "pre-*Batson* era," holding that during that time of developing 14th Amendment jurisprudence the failure to specifically mention the 14th Amendment in articulating the objection to the race-based exclusions was not determinative, so long as the objection impliedly (*Ford*) or expressly (*Trevino*) referred to *Batson*'s antecedent, *Swain v. Alabama*, 380 U.S. 202 (1965). *See Ford*, 498 U.S. at 418-419; *Trevino*, 503 U.S. at 566-567. *Trevino* further considered whether the equal protection claim was preserved in the state appellate proceedings, finding that express reference in an argument heading on direct appeal referencing the 14th Amendment, and the State's understanding that a 14th Amendment issue was presented, was sufficient to preserve the issue for this Court's review. 503 U.S. at 567.

Even though *Batson* was decided ten years, *Ford* five years, and *Trevino* four years before this case was tried,

Petitioners did not remotely comply with the requirements for properly invoking the equal protection clause in protest of allegedly discriminatory use of peremptory challenges. They neither expressly nor impliedly referenced the 14th Amendment at any time before their Petition for Review, Supp. App. C and D, and at all times treated the issue as one of the California Constitutional right addressed in *Wheeler*, the right to have the venire drawn from a representative cross-section of the community so as to assure trial by an impartial jury. On appeal they never invoked the 14th Amendment, invoking only *Wheeler*. The 14th Amendment was never mentioned until their Petition for Review. Petitioners failed to timely raise and preserve the issue for review under the standards set forth by this Court in *Ford* and *Trevino*.

4. *Petitioners' Failure to Timely Object Under the 14th Amendment, or Even Under California Law, Constitutes a Waiver of Any Objection*

A *Batson* objection or a *Wheeler* motion must be made before the jury panel is sworn. An objection made later is untimely and is treated as a waiver of the issue. *United States v. Chandler*, 996 F.2d 1073, 1102 (11th Cir. 1993), *cert. denied*, 512 U.S. 1227 (1994); *People v. Howard*, 1 Cal.4th 1132, 5 Cal.Rptr.2d 268, *cert. denied*, 506 U.S. 942 (1992). Petitioners failed to timely object; indeed, they failed to object at all; in fact, they expressly waived their objections.

A party ordinarily may not challenge an opponent's use of peremptory challenges for the first time on appeal. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *People v. Hayes*, 52 Cal.3d 577, 605, 276 Cal.Rptr. 874 (1990), *cert. denied*, 502 U.S. 958 (1991). Petitioners' failure to timely

object or move for relief waives the issue and precludes review.

5. *Petitioners Failed to Create a Record Adequate to Allow Meaningful Review*

A litigant challenging the use of peremptory strikes is required by California law to make "as complete a record of the circumstances as possible" because the issues are so fact- and credibility-sensitive. *People v. Davenport*, 11 Cal.4th 1171, 1199, 47 Cal.Rptr.2d 800 (1995), *cert. denied*, 519 U.S. 951 (1996); *Wheeler*, 22 Cal.3d at 281. In California, it is the appellant's burden to affirmatively demonstrate error by providing an adequate record, and "if the record is inadequate for meaningful review the appellant defaults and the decision of the trial court should be affirmed." *Mountain Lion Coalition v. Fish & Game Comm'n*, 214 Cal.App.3d 1043, 1051 n.9, 263 Cal.Rptr. 104 (1989). In particular, the record developed by Petitioners is inadequate because it contains no findings by the trial court, no *prima facie* showing of discrimination, and no statement of Respondents' reasons for their challenges. Petitioners' failure to develop an adequate record precluded review in the California courts and it precludes review here.

6. *The Record Petitioners Assembled Does Not Support a Finding of Discriminatory Use of Peremptory Challenges by Respondents*

Petitioners made no effort in the trial court to make a prima facie showing of discrimination, preferring to simply complain that Respondents were excluding minority jurors and issue empty threats to seek various forms of relief. The record reveals on its face that Respondents had objectively

reasonable, individualized reasons for striking each of the excluded minority jurors, as well as to accept each of the several minority jurors they chose to accept. California law requires that the moving party show a "strong likelihood" that the juror was challenged solely because of their group association. *People v. Arias*, 13 Cal.4th 92, 136 n.15, 51 Cal.Rptr.2d 770, *cert. denied*, 520 U.S. 1251 (1996); *Wheeler*, 22 Cal.3d at 280. Petitioners never made, or even attempted, such a showing. On this record, it does not appear. The presumption that Respondents were properly exercising their challenges, *Wheeler*, 22 Cal.3d at 278, was not overcome, as a matter of law.

7. *Petitioners Seek an Advisory Opinion*

Absent a finding of discrimination — or at least a record which conclusively demonstrates discrimination — the remedial issue presented by the Petition is wholly academic. There is no concrete, justiciable controversy over the adequacy of the California remedial machinery, because it was never brought into play and could not be triggered on this record. Accordingly, any opinion by this Court deciding the question presented by Petitioners would be an impermissible advisory opinion. *United States Nat'l Bank of Oregon v. Independent Insurance Agents of America, Inc.*, 508 U.S. 439, 446 (1993). Indeed, Respondents never briefed the remedy issue on the merits in the California court system, because it was so clearly not ripe for review. Supp. App. E RB 71b-75b

8. *This Fact-Bound Case Is Poorly Suited for This Court's Review*

As the Statement of the Case demonstrates, this is a fact-bound case. The threshold, dispositive issues, which necessarily must be decided in Petitioners' favor before any question of remedy could arise, are record-intensive and involve factual issues which would ordinarily be decided by the trial court and reviewed on appeal under a deferential clear error standard. *See Hernandez v. New York*, 500 U.S. 352, 369 (1991). Even assuming *arguendo* that the Petition raises a question which should be decided by this Court, that question is academic on this record and best left to a more suitable vehicle — a case which squarely and cleanly presents it.

9. *The Record Does Not Provide This Court With the Benefit of Any Court's Analysis of the Question Presented*

Petitioners' failure to raise the issue presented in this Petition to the trial court and California Court of Appeal ensured that this Court will not have the benefit of the California courts' views of the issue. Even the question of whether the re-seating remedy is a "better rule" for purposes of California law — the issue actually, albeit improperly, presented by Petitioners to the California Court of Appeal — was not developed in the Court of Appeal, largely because of Petitioners' express and implied waiver of the predicate discrimination issue. Indeed, Respondents found it unnecessary to even brief the merits of the issue in the California courts became the issue was not properly raised in the trial court and the record failed to contain findings or support for Petitioners' claim of discrimination. Supp. App. E RB 71b-75b The lack of discussion of these issues below,

due to Petitioners' failure to discharge their obligation to properly present and preserve them in the California courts, counsels for denial of the Petition.

10. *There Was No Error, And Any Conceivable Error Was Invited By Petitioners*

If the California trial court was in error, it was invited into error by Petitioners. Petitioners told the trial court that it had no choice under California law but to quash the venire if they successfully made a *Wheeler* motion. App. E 33-35 They never told the Court what they are telling this one — that the equal protection clause of the 14th Amendment compels a different remedy than the one *Wheeler* mandated for violations of the California Constitutional right to an impartial jury. They never told the trial court what they told the California Court of Appeal, that an alternative remedy was available under *People v. Williams*, 26 Cal.App. 4th Supp. 1, 31 Cal.Rptr. 2d 761 (1994). And they never even suggested the possibility of following the "federal rule" and reseating the stricken jurors until after the jurors had already been excused and it was too late to do so. The trial court had expressly advised Petitioners that it was looking for their "enlightenment" on the law in this area, and the Petitioners clearly understood that they were educating the trial court about the applicable California law. App. E 28, 33 Under these circumstances — as well as the facts that Petitioners never made the motion, never made a *prima facie* showing of discrimination, never proved purposeful discrimination, and never demonstrated they were entitled to a remedy — it was not error for the trial court to fail to offer a re-seating remedy. And any error would have been an invited one, not subject to reversal. *People v. Ochoa*, 19 Cal.4th 353, 458, 79 Cal.Rptr.2d 408 (1998); *People v. Barton*, 12 Cal.4th 186,

198, 47 Cal.Rptr.2d 569 (1995). The invited nature of an asserted error is one of the considerations counselling for denial of a Petition for Writ of Certiorari. *See Springfield v. Kibbe*, 480 U.S. 257, 259-260 (1987).

11. *If California Law Is to Be Revisited, the California Supreme Court Should Be Given the Opportunity, In a Properly Prepared Case*

If, as Petitioners argue, *Wheeler's* remedial provisions are an "anachronism" and out of step with modern equal protection jurisprudence, the State Supreme Court should be given the opportunity to address its vitality in the first instance, in a case properly presenting the issue. As Petitioners reminded the California Supreme Court and the California Court of Appeal in their briefs to those courts, the *Wheeler* Court promised to revisit the remedial issue if that became necessary. "If experience proves [that quashing the venire is not an adequate remedy], it will be time enough then to consider alternative penalties." 22 Cal.3d at 282 n.29. Supp. App. B Petition for Review 58b; Supp. App. C AOB 64b. And as Petitioners told the California Court of Appeal, at least one California appellate court had affirmed the use of the procedure suggested by Petitioners. Supp. App. C AOB 64b (citing *People v. Williams*, 26 Cal.App.4th Supp. 1, 31 Cal.Rptr.2d 761 (1994)). California courts are fully capable of changing California law if that is necessary or appropriate — when they are presented with the issue on an adequate record, with the objection timely asserted and ruled upon, and the issue properly preserved for review.

12. *The 14th Amendment Does Not Preclude Quashing the Venire to Remedy Discrimination*

Finally, there is no reason to accept Petitioners' implicit view that the remedy of quashing the venire and beginning jury selection afresh is constitutionally proscribed. In *Batson*, this Court endorsed that very remedy as one of the permissible methods of remedying the discriminatory exercise of peremptory challenges. 476 U.S. at 99 n.24. The Court reasoned there that the jury selection practices across the United States were so diverse that it would be inappropriate to prescribe any specific procedure to follow in preserving equal protection values. *Id.* The Court properly recognized that the issues concerning remedy and procedure were largely practical ones, and that the various state courts would, as always, act as laboratories to develop and refine the superior procedural safeguards. *See Arizona v. Evans*, 514 U.S. 1, 8 (1995); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (urging that the Court not impose federal constitutional restraints on the efforts of a State to "serve as a laboratory"). Of the various state appellate courts to have addressed the issue, 20 either require or allow their courts to quash the venire;[3] 5 require it;[4]

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[3] *See, e.g., Friedman v. State*, 654 So.2d 50, 52 (Ala. Crim. App. 1994); *Jefferson v. State*, 595 So.2d 38 (Fla. 1992); *State v. Levinson*, 795 P.2d 845, 350 (Haw. 1990); *Hunt v. Harrison*, 707 N.E.2d 232, 234-35 (Ill. App. 1999); *Koo v. State*, 640 N.E.2d 95, 100 (Ind. App. 1994); *State v. Williams*, 524 So.2d 746 (La. 1988); *Jones v. State*, 683 A.2d 520 (Md. 1996); *Commonwealth v. Fruchtman*, 633 N.E.2d 369, 373 (Mass.), *cert. denied*, 513 U.S. 951 (1994); *State v. Holloway*, No. 97APA05-622, 1998 Ohio App. LEXIS 4291 (Ohio App. Sept. 17, 1998); *Ezell v. State*, 909 P.2d 68, 72 (Okla. Crim. App. 1995); *Commonwealth v. Hill*, No. 2542, 1999 Pa. Super LEXIS 186 (Pa. Super. Mar. 8, 1999); *Woodson v. Porter Brown Limestone Co.*, 916 S.W.2d 896, 906-07 (Tenn. 1996); *State ex rel Curry v. Bowman*, 885 S.W.2d 421 (Tex. Crim. App. 1993), *cert. denied*, 513 U.S. 866 (1994); *Coleman v. Hogan*, 486 S.E.2d 548, 549-50 (Va.

and only 2 proscribe it.[5] None proscribe it on constitutional grounds. Thus, there is no consensus yet on what is the better rule, and no suggestion in the various state court laboratories that the remedy of quashing the venire offends the 14th Amendment.

Petitioners' reasoning is also flawed. They argue that the California remedy is inadequate because it is less protective of the rights of the stricken juror. If so, that may be a prudential consideration justifying selection of a different rule, but it does not make California law unconstitutional. If a rule which failed to prevent the prospective juror from being unconstitutionally excluded was itself unconstitutional, then the entire range of procedural requirements surrounding the *Batson* and *Wheeler* procedure would be constitutionally questionable. A litigant's failure to timely object, failure to premise the objection on the 14th Amendment, and failure to attempt to rebut pretextual justifications would all be ineligible to waive an objection and defeat the right of a juror to sit. For example, had Petitioners ultimately decided to object before the jury was sworn but after the jurors had been excused -- when the principal colloquy on remedy took place -- quashing the venire would have been the only remedy practically available. As *Batson* recognized, the question of remedy is a balancing of the involved interests against the backdrop of the state jury

1997); *State v. Walker*, 453 N.W.2d 127, 134-35 n.12 (Wis.), *cert. denied*, 498 U.S. 962 (1990); and cases cited *infra* note 4.

[4] *See, e.g., State v. Gonzales*, 538 A.2d 210, 215 (Conn. 1988); *State v. Scott*, 704 A.2d 1359 (N.J. Super. 1998); *State v. Gilmore*, 511 A.2d 1150 (N.J. 1986); *State v. McCollum*, 433 S.E.2d 144 (N.C. 1993), *cert. denied*, 512 U.S. 1254 (1994); *State v. Jones*, 358 S.E.2d 701, 704 (S.C. 1987).

[5] *See, e.g., Connerly v. State*, 544 So.2d 1370, 1372 (Miss. 1989); *State v. Parker*, 836 S.W.2d 930, 935 (Mo.), *cert. denied*, 506 U.S. 1014 (1992).

selection procedures; it is not, and cannot be, an inflexible constitutional imperative.

In any event, given the number of state laws which would be struck down by a determination that this widespread practice was unconstitutional, it would be inappropriate to use this case, with this record, and without the benefit of the views of the California courts on the issue, to strike it down. The question presented is not of constitutional dimension; but if it was, the prudent method of resolving it would be to await a case that actually, squarely, and unambiguously presents it.

CONCLUSION

For all of the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX A
REPORTER'S TRANSCRIPT

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THE COURT: State, all right.

PROSPECTIVE JUROR GARCIA: And I inspect, and license, and survey nursing homes, and I already have schedules set out I have to go Sonora, and Chico, and I think 10 weeks would be just too much to be gone.

THE COURT: Well, other people do the same kind of -- do you have other people that work there?

PROSPECTIVE JUROR GARCIA: Yeah, we -- we work in teams of three or four people, but if one person is busy then --

THE COURT: What happens when you're on vacation?

PROSPECTIVE JUROR GARCIA: Well, I usually only go for a week at a time.

THE COURT: Okay. How long have you worked there?

PROSPECTIVE JUROR GARCIA: Five years.

THE COURT: Okay, thank you. You get compensated while you're serving here, though.

PROSPECTIVE JUROR GARCIA: Yes, I do.

THE COURT: Okay. Thank you, Ms. Garcia.

Yes, who's raising their hand now?

PROSPECTIVE JUROR LOPEZ: My name is Mary --

THE COURT: What is your name?

PROSPECTIVE JUROR LOPEZ-GARCIA: -- Mary Martha Lopez-Garcia.

THE COURT: Wait a minute. Hold up.

THE CLERK: 22, judge.

THE COURT: 23, yeah.

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PROSPECTIVE JUROR AIROZA: For any of this -- any of this.

THE COURT: Okay. Yes, ma'am.

PROSPECTIVE JUROR LOPEZ-GARCIA: And you have a letter from my employer

THE COURT: Yes.

PROSPECTIVE JUROR LOPEZ-GARCIA: -- about the hardship.

THE COURT: Yeah, we'll -- we'll -- we'll read it. Okay. Yes, ma'am?

PROSPECTIVE JUROR VOICE: Your Honor, my husband is not well. He has diabetes and he had a stroke and has high blood pressure. And we're trying to get some landscaping done on two pieces of land that we have. We're retired. But I'm the one that does a lot of physical work, and I'm afraid in ten weeks that he might work himself to death.

THE COURT: But you an expand upon that when you're questioned by the attorneys.

PROSPECTIVE JUROR VOICE:
Okay.

THE COURT: They -- they'll be questioning you, and we may or may not excuse you --the defense. Obviously, we have to get the jurors to hear this matter.

All right, the attorneys are going to question you regarding what information they have pertaining to you from the questionnaire, and generally, other kinds of questions that bear upon your serving as a juror. And you must--you're under oath, and so you have to answer all the questions truthfully.

that in the course of their work or -- or elsewhere? No? Okay.

Has anyone ever had problems with steering in a car? Where -- where the steering just went out.

PROSPECTIVE JUROR LOPEZ-GARCIA: Mine didn't go out.

MR. L. PADWAY: Okay.

PROSPECTIVE JUROR LOPEZ-GARCIA: I drive a van.

MR. L. PADWAY: Uhm-hmm.

PROSPECTIVE JUROR LOPEZ-GARCIA: And I guess a month- and-a-half or so, the steering wheel wouldn't lock, it was just loose.

MR. L. PADWAY: It was just loose?

PROSPECTIVE JUROR LOPEZ-GARCIA: But they said it was just three bolts in the Chevy vans, I guess. One got loose or whatever, so I had to take it in and just have the -they said it was not dangerous to drive because I drove it for about three weeks after that. They couldn't get it in.

MR. L. PADWAY: So about -- so -- but they were able to fix it and it didn't cause an accident or anything like that?

PROSPECTIVE JUROR LOPEZ-GARCIA: No, I just felt uncomfortable because it was too --

MR. L. PADWAY: Uhm-hmm, it was just loose.

PROSPECTIVE JUROR LOPEZ-GARCIA: -- it was just too loose for me.

MR. L. PADWAY: All right. Has anybody ever had a problem with & seat belt which didn't open when it was supposed to open, or --

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PROSPECTIVE JUROR LOPEZ-GARCIA: Yes, my Chevy van right now does not -- the back seat of my -- of the kids sometimes sticks and it won't --

MR. L. PADWAY: Won't unlatch.

PROSPECTIVE JUROR LOPEZ-GARCIA: -- unlatch until one of the boys plays with it, and then it unlatches.

MR. L. PADWAY: All right. And how old are the -- are the kids?

PROSPECTIVE JUROR LOPEZ-GARCIA: My 9 - and 12 - year- old daughters.

MR. L. PADWAY: Uhm-hmm. And so you sometimes have to go help them get out of the belt?

PROSPECTIVE JUROR LOPEZ-GARCIA: I normally don't. My older boys do. They're -- I have a 16 and 17.

MR. L. PADWAY: They come in handy for that.

PROSPECTIVE JUROR LOPEZ-GARCIA: That they do.

MR. L. PADWAY: All right. Thank you.

And, Mrs. Hufnagle.

PROSPECTIVE JUROR HUFNAGLE: Uhm-hmm.

MR. L. PADWAY: What was your experience?

PROSPECTIVE JUROR HUFNAGLE: The passenger in the front seat, it got stuck and, you know, we wig -- wiggled try -- finally got it open, and the next time we went to use it, a piece had broke of f inside, so we didn't get to use it. I mean, did not use it until we got it fixed.

MR. L. PADWAY: Good, but they were able to fix it and it --

PROSPECTIVE JUROR HUFNAGLE: It actually was

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recalled, and so they --

MR. L. PADWAY: Uhm-hmm.

PROSPECTIVE JUROR HUFNAGLE: -- replaced it for us.

MR. L. PADWAY: Fine. And, was there -- thank you.

THE COURT: What brand automobile is that?

PROSPECTIVE JUROR HUFNAGLE: Mitsubishi.

MR. L. PADWAY: Does anyone have any experience with a friend, or relative, or someone who had some serious burn injuries? Anyone have any experience caring for somebody who -- who might have?

PROSPECTIVE JUROR AUSTIN: It's not -- it doesn't pertain to a car, but I had a friend who had a burn injury; he died from it.

MR. L. PADWAY: Oh, boy.

PROSPECTIVE JUROR AUSTIN: He was a painter and they were -- he was

using -- to wipe the walls down with whatever it is, and they forgot to turn the pilot off in the oven, and -- and he got third degree burns. He died from them.

MR. L. PADWAY: How -- how did the -- I'm -- I'm sorry to hear that. How long ago was that?

PROSPECTIVE JUROR AUSTIN: About five years ago.

MR. L. PADWAY: About five years? In this case, there's going to be some testimony, there was a collision and then there was a fire in the car, very serious burns.

Is there anything about that experience that you've had that would cause you any concern in sitting as a juror in this case?

year olds, and nine year olds, ten year olds, so forth. You've got a nine year old at home.

Is there anybody -- I'll start with you in the box -- that's going to have difficulty dealing with this case because you're going to see films -- you're going to see films of the happiest moments in these people's family life -- vacation films, and so forth. And you're going to see photographs of a -- of a -- of a beautiful little boy and a beautiful little girl that -- that were very badly hurt. And it's going to hurt -- it -- it hurts me to talk about it; it really does. It's a very sad situation.

Can all of you assure me -- promise me -- that you can deal with that? If you think you can't deal with it, you know, if it's going to -- if it's going to cloud your judgment, it's going to make it painful for you because of what it's going to do, is it's going to cause you to bring back your own memories of your own accidents, your own losses, can you deal with it?

Is there anybody here that thinks that the emotion and -- and the pain that -- that they're going to feel here, is going to make it difficult for them to decide this case fairly?

PROSPECTIVE JUROR LOPEZ-GARCIA:
I just have one comment --

MR. WALKER: Sure.

PROSPECTIVE JUROR LOPEZ-GARCIA: -- about mine is that I do get -- and I think all of us that have kids --

[Off record conversation.]

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MR. WALKER: I have kids, that's why I choke up.

PROSPECTIVE JUROR LOPEZ-GARCIA: That's what I'm saying --

MR. WALKER: Yeah.

PROSPECTIVE JUROR LOPEZ-GARCIA: -- is that when I'm on T -- when I see on TV on the news when they have kids that are abused, I get very emotional. I think that's one of my angers, that I -- you know, kids, it's not their fault.

MR. WALKER: That's right.

PROSPECTIVE JUROR LOPEZ-GARCIA: So I -- I don't know how, because of my nine year and my twelve year old, then, like I say, even when I see my 17 and my 23 year old, and I see little pictures of them, you know, we still get emotional, my husband and I.

MR. WALKER: Oh, yeah.

PROSPECTIVE JUROR LOPEZ-GARCIA: So --

MR. WALKER: All right, when you see these films --

PROSPECTIVE JUROR LOPEZ-GARCIA: -- yeah, that's what I'm saying, so--

MR. WALKER: Yeah.

PROSPECTIVE JUROR LOPEZ-GARCIA: --I don't know how I will react.

MR. WALKER: All right.

PROSPECTIVE JUROR LOPEZ-GARCIA: And I'm trying to be honest.

MR. WALKER: I want you to. And, I mean, I'm trying to be honest with you because I have family at home, too,

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and I--

PROSPECTIVE JUROR LOPEZ-GARCIA: And when I did see --

MR. WALKER: It brings it all back.

MR. M. PADWAY: Your Honor, may I approach the bench?

MR. WALKER: It's going to bring all these --

THE COURT: Let's -- let's forget about our families at home.

MR. WALKER: Okay, I'm -- I'm -- I will. I just want to be sure that you can decide this case fairly and based on logic and evidence without your emotions getting the better of you.

PROSPECTIVE JUROR LOPEZ-GARCIA: I think the majority of the evidence, and everything else, I can be more logical, I think, than emotion taking over.

MR. WALKER: Is there anybody else that thinks that they're going to have difficulty dealing with this case, and with the

evidence, because of the emotional appeal, or your own experiences that you know of?

Now, you heard that I represent Toyota Motor Corporation. It's a Japanese-based, international company, and it's a big company. Toyota Motor Sales, which is an American importer of the vehicle. Are any of you, knowing that -- that plaintiffs are a family that lives in Hayward, going to have trouble balancing the scales equally here, and treating a large Japanese company, a large American company, the sane as you would the Lozanos, given the emotional appeal? Does anyone have that -- any doubts

own seat belt?

PROSPECTIVE JUROR HUFNAGLE: The driver?

MR. WALKER: On -- on the --

PROSPECTIVE JUROR HUFNAGLE: The passenger --

MR. WALKER: -- Mitsubishi.

PROSPECTIVE JUROR HUFNAGLE: -- yes.

MR. WALKER: On the passenger side?

PROSPECTIVE JUROR HUFNAGLE: Yes.

MR. WALKER: What was the problem?

PROSPECTIVE JUROR HUFNAGLE: We had hooked it one time and it got stuck, and then we wiggled it, got it out. The next time we went to use it, a piece had broken in the buckle itself --

MR. WALKER: Okay.

PROSPECTIVE JUROR HUFNAGLE: -- and so we went to the place that --

MR. WALKER: Do you know if that was a Tacata seat belt? Does that recogni - does that ring a bell? Tacata?

PROSPECTIVE JUROR HUFNAGLE: No.

MR. WALKER: Thank you. Ms. Garcia -- Ms. Lopez-Garcia, you have a nine year old at home?

PROSPECTIVE JUROR LOPEZ-GARCIA: Yes.

MR. WALKER: I noticed on your questionnaire there may be a problem, you'd have to make arrangements to pick him up.

PROSPECTIVE JUROR LOPEZ-GARCIA: Correct.

MR. WALKER: Can you get somebody to do that while you're --

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PROSPECTIVE JUROR LOPEZ-GARCIA: It's hard because my mother's --

MR. WALKER: -- here in --

PROSPECTIVE JUROR LOPEZ-GARCIA: -- 87 years old, and she just can't walk the distance, the two-miles going and from the school. So that's -- I've been very convenient [sic] from where I work in the school district, is that during my break, I pick him up and take him over there, and they've been very good about that, since he was in kindergarten.

MR. WALKER: If you're here with us for June and July, is that going to be a problem? I mean, won't school be out?

PROSPECTIVE JUROR LOPEZ-GARCIA: He gets out on the 12th of June, 50 then there shouldn't be a problem because my other boys will be home taking care of him.

MR. WALKER: Ms. Garcia, you -- tell us

about your work. I guess by background you're a registered nurse.

PROSPECTIVE JUROR GARCIA: Yes.

MR. WALKER: Okay, do you actually help treat people now, or is there -- there -- what is it you do?

PROSPECTIVE JUROR GARCIA: What I do now is I license and inspect health facilities, nursing homes, hospitals, clinics, all types. It's -- it's a yearly inspection, usually. I'm -- but we usually answer to complaints from nursing homes regarding whatever it is -- abuse, or whatever. I don't actually have hands-on treatment now.

MR. WALKER: Did you for awhile? Before you had your

present job, did you do some hands-on nursing?

PROSPECTIVE JUROR GARCIA: Well, in the beginning I did. I worked in the acute care hospitals for 22 years. And then I went into the rehab field. I worked for insurance companies and I -- I didn't have hands--on, I just went and visited injured workers and made evaluations, and tried to return them to work, or refer them to vocational rehabilitation. No hands-on.

MR. WALKER: Okay.

THE COURT: Good time to take a recess, counsel?

MR. WALKER: Sure.

THE COURT: Ladies and gentlemen, we're going to take a 15 minute recess and resume at 11:15. When you return to the courtroom, you'll take the identical seat that you're now sitting in.

Keep in mind throughout this entire proceeding, you're not permitted to talk to each other, or anyone else, about this case or what -- or what is occurring in this courtroom. You're not permitted to talk to the lawyers; they're not permitted to talk to

you, or witnesses, should any be present, or any of the party plaintiffs or defendants. Keep in mind this continues throughout the entire proceeding whether I remind you of it, or not.

We'll resume at 11:15.

[11:00 a.m. Recess taken.]

[11:15 a.m. Parties and counsel are present; the prospective jurors are seated in the courtroom.]

THE COURT: Everyone ready?

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MR. RAMSEY: And then I -- you got it fixed, I guess, and -- and that was it.

PROSPECTIVE JUROR HUFNAGLE: Right.

MR. RAMSEY: Okay. That's all I have. Thank you, Ms. Hufnagle.

Ms. Lopez-Garcia, you -- you indicated in your answers some steering and seat belt problems, or malfunctions, or complaints at some time in the past. What was the steering problem? Forgive me, if --

PROSPECTIVE JUROR LOPEZ-GARCIA: It was --

MR. RAMSEY: -- things are overlapping with other questions.

PROSPECTIVE JUROR LOPEZ-GARCIA: -- they said that the Chevy vans have three bolts that hold on, I guess, onto the steering column.

MR. RAMSEY: Okay.

PROSPECTIVE JUROR LOPEZ-GARCIA: And one of the bolts had broken, and it just was very loose, but they said there was no danger driving it, or any

problems. So I drove it for about a couple of weeks before they could take it in. Now it's fixed.

MR. RAMSEY: No problem?

PROSPECTIVE JUROR LOPEZ-GARCIA: No.

MR. RAMSEY: Okay. And, as far as the seat belt --

PROSPECTIVE JUROR LOPEZ-GARCIA: The seat belt did jam. It still jams every so often. Most the time it was pretty good, I could unfasten it, and I only have the little one, and maybe that's bad --

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MR. RAMSEY: Okay.

PROSPECTIVE JUROR LOPEZ-GARCIA: -- having little one sit there. But there's always someone to help him out of it.

MR. RAMSEY: Okay. That's the problem then, that you've already discussed with us.

PROSPECTIVE JUROR LOPEZ-GARCIA: Correct.

MR. RAMSEY: And -- and there is no other seat belt problem you've had, other than the one you've already shared with us this morning?

PROSPECTIVE JUROR LOPEZ-GARCIA: The front passenger would jam every so often and the -- I guess where you pull it out, and I would not let any of the kids sit there until we have that fixed, every so often, you know. And then that would have been fixed. But there was nobody got hurt or anything else from that.

MR. RAMSEY: Okay. Now, you -- you mentioned the other day that you had the -- the payroll responsibility at your employer's, and then mentioned again this

morning to Judge Gallagher about a letter from your employer.

PROSPECTIVE JUROR LOPEZ-GARCIA: Correct.

MR. RAMSEY: Is there -- and you mentioned to Mr. Walker that -- that your child will be out of school in mid-June, is it?

PROSPECTIVE JUROR LOPEZ-GARCIA: Yes.

MR. RAMSEY: So that part of the problem would be resolved by that time?

PROSPECTIVE JUROR LOPEZ-GARCIA: Correct.

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MR. RAMSEY: How about the payroll problem, and the work problem, is that going to be a problem for you?

PROSPECTIVE JUROR LOPEZ-GARCIA: That's going to be a problem.

MR. RAMSEY: And a problem for your employer?

PROSPECTIVE JUROR LOPEZ-GARCIA: Very much so, that's why they wrote the letter.

MR. RAMSEY: Okay. And, do you feel that if -- if you had to serve under the circumstances, that it would be a distraction to you, worry and concern about the job problem?

PROSPECTIVE JUROR LOPEZ-GARCIA: It will, plus I will have to probably be working a lot of evenings and weekends, and that's going to take away from my family that I'm not going to be too happy from, you know, the --

MR. RAMSEY: Okay. And the distraction to you would be just concern ab -- about the fact -- about the overall work situation, your responsibilities at work, and the fact that they're going to have to do

something else if you have to be here, and --

PROSPECTIVE JUROR LOPEZ-GARCIA: Well, they can't really do much because we checked with our County Office of Education in Woodland, and they are reorganizing and the person that was doing a lot of -- or, working with us, she just took another position in another department in that same depart -- in that same building, but in another department, and so she's not there to help any longer. And, so there's no one else that can do the work.

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MR. RAMSEY: Okay.

PROSPECTIVE JUROR LOPEZ-GARCIA: And with our closing --our physical [sic] end this -- in this month, June, I have an additional two more payrolls. Instead of the two that I have, I have now four. So that's going to create a hardship for everyone, especially the substitutes when they're not on the computer and I have to add their hours onto the computers.

MR. RAMSEY: Okay. Okay, and -- and your employer's side of it is -- is in the letter.

PROSPECTIVE JUROR LOPEZ-GARCIA: Correct

MR. RAMSEY: Okay. Thank you, ma'am, I have no -- no more questions.

Ms. Garcia, I have no questions of you. Thank you for your earlier answers; I have nothing further to ask.

Mr. Yee, with regard to the hardship that you mentioned the other day, that has to do with a 4th of July trip to -- to Washington state?

PROSPECTIVE JUROR YEE: Yes.

MR. RAMSEY: And that -- as I recall, you shared with us you would be leaving Wednesday before the 4th, in the evening.

PROSPECTIVE JUROR YEE: Yes.

MR. RAMSEY: So you'd be -- if you were at work you'd be working Wednesday.

PROSPECTIVE JUROR YEE: Yes.

MR. RAMSEY: And then the -- the -- the work day that you would normally -- you would have missed would be

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Jarvis, your Honor?

THE COURT: Yes, we'll do that -- are you through questioning these jurors, other than the -- Murphy?

MR. L. PADWAY:
Yes, your Honor.

MR. WALKER: Yeah, a hardship with -- with Mary Lopez-Garcia.

THE COURT: Which one did you say?

MR. WALKER: She was the one that submitted the letter to you.

THE COURT: Oh, that's another one, yeah. It's from the school superintendent, I think, or her superior, indicating the hardship that would be inflicted on the Washington Unified School District, substantially what she's already told us. I'm willing to excuse her if you people agree. Want to read it?

MR. L. PADWAY: Yeah, I -- I'm sure the school district can make some arrangements. I mean, it just -- I mean, I haven't seen the letter but it just seems to me that, you know --I mean, it just -- it just doesn't -- I mean, it's --

THE COURT: Well --

MR. L. PADWAY: it's not a real unique position.

THE COURT: -- yeah, and she had the school -- a child problem, but that'll be taken care of, I guess, June 12th, didn't she say?

MR. L. PADWAY: Right.

THE COURT: The school will be out.

MR. L. PADWAY: Yeah.

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MR. RAMSEY: Her -- the -- the thing that bothers me about it, your Honor -- I'm standing up partly because I can't see you over here.

THE COURT: Yeah, I understand.

MR. RAMSEY: I -- I asked her and she did say that she acknowledges that she would -- it's a troubling enough factor to her that she's going to be distracted by it, and I -- I think, as Larry Padway said, for consistency's sake, not it's true it impacts some of them -- worse than the others. Some don't pay at all, some do pay.

THE COURT: Yeah, but I don't -- you actually couched those questions in a form that she was responding in exactly as you were inviting her to. I think if she were examined further, which I -- I assume if the other want to keep her would -- would find out maybe from her that she still would put that aside in terms of being fair.

MR. RAMSEY: That may -- that --that may be. I --

THE COURT: It seems to work that way.

MR. RAMSEY: Okay.

THE COURT: Depending upon who's questioning the juror.

MR. RAMSEY: Okay.

THE COURT: Anyway, I -- you know, I'll let you question her further on that subject.

MR. L. PADWAY: All right. I -- I wasn't really in --in a -- I mean, I don't think there's been a cause challenge which nas been established.

THE COURT: Well, I don't think there is, either.

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[Off record conversation between counsel.

MR. M. PADWAY: Your Honor, along the lines of the matter that I brought to the -- the court's attention with respect to Ms. Louise [sic] Garcia, the record should reflect that the jurors [sic] exercised a challenge again, against Ms. Austin, who is black. So they've now exercised two challenges against individuals who are in readily identifiable racial -- racial classes. And I -- I want to make that a matter of record at this point. I don't want to move for relief without an opportunity to consult with our jury consultant.

THE COURT: Well, any --

[Off record conversation between counsel.]

THE COURT: -- there's nothing before me on that right now. Any comment? Anything in the record about the the two --

MR. LAZARUS: If -- if we have to respond at the appropriate time, we'll go ahead and do so.

THE COURT: Okay. All right.

MR. WALKER: Yeah, I also don't want to be intimidated in not doing what I think's best. So --

THE COURT: Well, don't be then.

MR. WALKER: I won't.

THE COURT: All right.

MR. WALKER: Thank you.

MR. LAZARUS: Your Honor, one other item -- clarification. On our list we saw that there was a juror named Steven Robertson, who, from -- from -- from where I

sit it looks like he might have been passed over somehow. He should have been number 30.

THE COURT: On the list you mean?

MR. LAZARUS: He should have been juror number 30.

THE CLERK: He was ill, judge.

THE COURT: Oh, oh, oh, oh, oh. He was here today -- this morning -- and I received a note from Vivian, the attendant, that he'd been throwing up outside, and he -- and he was very ill and he had to go to Kaiser as soon as possible, and he was waiting in the hall.

She came in and gave me his note, so I told her to release him.

MR. LAZARUS: Okay, that clears that up.

THE COURT: Okay.

MR. RAMSEY: Then, your Honor, are we going to let Ms. Burkholder go then?

THE COURT: I'm going to let -- yes, I'm going to let Madge Burkholder go. So let's

go ahead with our challenges, then I'll call them all in.

The next challenge is with the defense.

MR. RAMSEY: Yes, your Honor, the defense will thank and excuse juror number 9, Helen Garcia.

THE COURT: Okay, Helen Garcia is released. Charged to the defense, and Terry Bard will move into that chair.

Okay, challenge is with the plaintiff.

MR. M. PADWAY: Before we make our challenge, your Honor, I would like the record to reflect that that's the third challenge of a suspect group, and I would like to say

right now on the record that whether or not we ask for relief from the court from these obviously discriminatory challenges which are being made here, it's my opin -- opinion that we have an independent cause of action for discrimination. And I -- I want to make that a matter of record.

THE COURT: Challenge with the plaintiff.

MR. L. PADWAY: Your Honor, the plaintiffs will thank and excuse Mr. Brown

MR. RAMSEY: I'm sorry, who is it?

MR. M. PADWAY: Brown.

MR. L. PADWAY: Mr. Brown, juror number -- 1, 2, 3, 4.

THE COURT: Number -- what number?

MR. M. PADWAY: 4.

MR. L. PADWAY: 4, Brown.

THE COURT: 4, oh, Mr. Brown? Okay, Mr. Jack Brown, charged to the plaintiff and Leon Sims moves into that chair.

MR. WALKER: Can we have a minute?

THE COURT: Yeah, take your time.

[Brief pause; off record conversation between counsel.]

MR. LAZARUS: This is going to take a minute. It'll take some of them, I'm sorry, your Honor.

THE COURT: Well, the challenge is with the defense, isn't it?

MR. LAZARUS: Yes, your Honor.

but so far, yes.

MR. L. PADWAY: All right. Do you feel like you've got some brand loyalty --

PROSPECTIVE JUROR COX: No.

MR. L. PADWAY: -- to Toyota?

PROSPECTIVE JUROR COX: No.

MR. L. PADWAY: Next car could be anything.

PROSPECTIVE JUROR COX: Yeah.

MR. L. PADWAY: All right. And on the -- on the Camry wagon, where does the gas go in?

PROSPECTIVE JUROR COX: Left rear corner.

MR. L. PADWAY: Have you ever had any experience with the Maita dealerships, or Toyota dealerships?

PROSPECTIVE JUROR COX: No.

MR. L. PADWAY: Thank you.

MR. WALKER: Mr. Gomez.

PROSPECTIVE JUROR GOMEZ: Yes.

MR. WALKER: Are you retired?

PROSPECTIVE JUROR GOMEZ:
Am I retired?

MR. WALKER: Yeah.

PROSPECTIVE JUROR GOMEZ: No.

MR. WALKER: You're not. You're still working?

PROSPECTIVE JUROR GOMEZ:
Yeah.

MR. WALKER: You were hurt one time on a forklift.

PROSPECTIVE JUROR GOMEZ: Yes.

MR. WALKER: Okay, did you make a claim on that? Was there a lawsuit, or.

PROSPECTIVE JUROR GOMEZ:
It didn't go to court.

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we're ready for you, we'll call you back in.

[11:02 a.m. The jury and prospective alternate jurors are excused from the court and the following proceedings are held outside the presence of the jury and prospective alternates.]

MR. M. PADWAY: Your Honor, we want Mr. --

THE COURT: Oh, yeah, Mr. --

MR. M. PADWAY: -- Mr. Sanchez.

THE COURT: Well, we'll call him. Oh.

MR. M. PADWAY: No.

THE COURT: We'll call him back.

MR. M. PADWAY: Okay.

[Off record conversation.]

THE COURT: All right, the record will reflect the jury's absent at the moment. I excused them because we went into chambers. In chambers we discussed the current sitting alternate jurors.

The plaintiff excused Mr. Barr and, therefore --

MR. M. PADWAY: Ms. -- Ms. Barr.

THE COURT: Huh?

MR. M. PADWAY: Ms. Barr.

THE COURT: -- Mrs. Barr, that's right -- and therefore, Wolff was moved to seat number 13. The present sitting then is Wolff in 13, Gomez in 14, Morris in 15, and Griffen in 16. And the only remaining alternate is Mr. Sanchez.

And then the defense had the next challenge and they moved to excuse Mr. Gomez, and thereupon the defense [sic]

indicated they wanted to have a hearing on the record regarding the exercise of that peremptory challenge as to Mr. Gomez.

And we have, of course, Mr. Sanchez coming up that we obviously will have to interview further.

Do you want to be heard on your motion?

MR. M. PADWAY: Yes, I do.

MR. WALKER: Your Honor, I think you misspoke; you said the defense asked for a hearing. I think the plaintiff asked for the hearing.

THE COURT: All right.

MR. WALKER: Just so the record's --
THE COURT: Okay.

MR. M. PADWAY: Your Honor, I think at this point what we're seeing is fairly blatant discrimination, both on the basis of individuals having Spanish surnames, and on the basis of race. I don't think there's much doubt in anyone's mind that that's going on, and it's really being flaunted.

I don't want to make a motion which would in any way result in a difference in the composition of the jury panel. In other words, I don't want to make any motion which would have as a possible result the calling of a new jury because I don't think that the defense should benefit further by reason of having done this.

But, I would like a date for a hearing re contempt because of these acts of discrimination are both federal and state crimes. They show gross disrespect for the court

and the system, and I think that we should have an appropriate hearing at an appropriate time with all of the procedural safeguards. And I would ask for a date for that type of a hearing.

THE COURT: Quite frankly, I'm not familiar with the procedures that the court is expected to follow in these kind of situations, and -- and I don't know how to react to your request.

MR. M. PADWAY: It -- it's a very unusual situation, your Honor -- THE COURT: Yeah.

MR. M. PADWAY: -- and I think the most that we could do at this point would be sce -- set a schedule for us to -- and -- and I don't think there's any particular rush on this, but I think the court should --oth -- other to the extent that memory may be involved -- but, all that I'm asking is that the court set a -- a date by which we could do the paperwork to initiate the proceeding, and then at some point, we're going to need a hearing date.

THE COURT: Well, what do we do in the meantime regarding --

MR. M. PADWAY: Proceed.

THE COURT: Proceed? Defense want to be heard?

MR. LAZARUS: Yes, your Honor, the -- the motion must be made in a timely fashion, and I believe timely fashion must be read in connection with the prejudice inquiry and whether the error can be cured, if any there is. And I think the law is clear that this motion, if it's going to

be made, has to be made right now so we can deal with it right now and try to cure any problem that resulted.

Now, first of all, we're not discriminating in any respect. But, we don't even have to respond because they haven't made a prima facia showing. But right now, all I'm saying is, if they're going to make a motion, let them make it and then we'll deal with it. It has to be made now, and it should be made before the jury is impanelled.

MR. M. PADWAY: The -- we're not making a motion with respect to the composition of the jury; but, the fact that there -- that there may be effects on the composition of the jury in no way affects the question of whether or not there's been an act of contempt.

Frankly, it's a direct contempt, and with a direct contempt like that, the court has the ability to take summary procedures. However, under the circumstances, I don't see any necessity for that, and I think that the wiser course would be that we, in due course, and in a timely fashion, and with all available procedural safeguards that we deal with this at -- at a later -- at -- at a

later time. And I don't think we need to delay our case to do that.

THE COURT: Well, if -- if that's so, and I -- you know, I'm not familiar with the -- the procedure, I would then go ahead and allow the defense to exercise their challenge, which is -- as to Mr. Gomez, which is their number three. And then the next person into that seat is going to be Sanchez, unless he's excused for cause, and

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we'll have to have a further discussion with Mr. Sanchez.

MR. LAZARUS: Yeah. For the record, Mr. Sanchez, or Dr. Sanchez, is fine with us. We want to keep him; he's fine with us.

MR. M. PADWAY: I wouldn't expect reciprocal fairness.

MR. L. PADWAY: I'm shocked by that.

MR. LAZARUS: No matter what his surname.

THE COURT: Well, we're still going to have to have a --

MR. M. PADWAY: Right.

THE COURT: --further interview with Mr. Sanchez.

All right, then, I will excuse Mr. Gomez as a challenge by the defense, and call Mr. Sanchez in, please, if you will, Barbara.

THE CLERK: Mr. Sanchez.

[Prospective juror Sanchez is seated.]

THE COURT: Just have a seat wherever you wish, Mr. Sanchez. Do you want to tell us more now about what you were saying in regard to your feelings or attitude?

PROSPECTIVE JUROR SANCHEZ: Oh, I just have a very entrepreneurial spirit, and I look at things from a biased point of view in terms of that. I'm very business oriented, and I just think that businesses flourish with productive --

THE COURT: Keep your voice up, they have to hear you. You -- you're --

PROSPECTIVE JUROR SANCHEZ: Did you hear that?

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[Brief pause; off record conversation.]

MR. RAMSEY: Nev -- never mind, your Honor.

[Brief pause; off record conversation between court and clerk.]

THE COURT: All right, that means I'm going to call in the jury and excuse Mr. Barr and Mr. Sanchez.

MR. M. PADWAY: Ms. Barr.

THE COURT: Huh? Oh, excuse Barr -- excuse Bàrr.

And excuse Sanchez. And then we're down -- I guess we'll still have Griffin, Morris, and Wolff. Right?

MR. M. PADWAY: Correct.

THE COURT: Okay.

[Brief pause; off record conversation between counsel.]

THE COURT: I think that's correct. I think.

MR. L. PADWAY: Your Honor, everybody has used three challenges?

THE COURT: yes, everyone has used three. Yes. Each one has one left, so we should get a jury this next around.

Bring the panel in.

[11:20 a.m. The jury and prospective alternate jurors are seated.]

THE COURT: All right, the jury panel has returned to the courtroom.

Mrs. Barr, you're excused. Thank you for being here. You must return to the jury assembly room.

Mrs. Wolff, you move into that seat.

Mr. Sanchez, you're excused. Thank you for being

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We've got the -- the Kelley transcript to worry about, and -- and that's pretty thick.

And then we've got three new problems that I didn't know we had until Wednesday when we took those depositions. We've got a problem with each of those witnesses -- a significant problem --

THE COURT: So it's going to take more than this afternoon, then.

MR. RAMSEY: That's what I -- I -- I -- I think it would be wiser to wait till Tuesday morning, but --

THE COURT: Looks like we're going to have to bring them back on Tuesday, then, at 9:30.

MR. RAMSEY: All right.

MR. M. PADWAY: Okay.

THE COURT: All right, any -- regarding the -- and that's what I'll do -- regarding challenges, you're not going to exercise any more; is that it?

MR. WALKER: That's right, we're -- the defendants will pass now, so we have a jury.

THE COURT: That's right, we have a jury then.

MR. WALKER: Yes, sir.

MR. L. PADWAY: Well, we'll -- plaintiffs will also pass.

THE COURT: You already did pass.

MR. L. PADWAY: Oh, we did?

MR. M. PADWAY: Yeah.

MR. L. PADWAY: Okay.

THE COURT: Anyway, you passed twice.

SUPPLEMENTAL APPENDIX B
PETITION FOR REVIEW TO THE
CALIFORNIA SUPREME COURT

I
ISSUES PRESENTED FOR REVIEW

1) Should this court modify California law so that judges may deny the exercise of racially discriminatory peremptory challenges?

2) Does the Wheeler remedy violate the constitutional right of minority jurors to serve? People v. Wheeler (1978) 22 Cal. 3d 379 requires judges to discharge the venire when a party has exercised peremptory challenges in a racially discriminatory manner. The *Wheeler* rule requires modification to permit denial of racially discriminatory peremptory challenges, in order to (1) prevent parties from using discriminatory challenges strategically and (2) protect the constitutional right of fit minority jurors to serve.

*****

II

BASIS OF REVIEW

A. People v. Wheeler

In People v. Wheeler (1978) 22 Cal. 3d 379, this court prohibited racially discriminatory peremptory challenges, and created dismissal of the entire venire as the sole remedy. This court noted in Wheeler at footnote 29 that "[i]f experience proves otherwise, it will be time enough then to consider alternative penalties." Since Wheeler, federal law evolved requiring trial judges to deny individual discriminatory challenges, instead of following the Wheeler remedy. This federal rule protects the constitutional right of fit minority jurors to serve, United States v. DeGross (9th Cir. 1992) 960 F. 2d 3 1433, 1443, which the Wheeler rule does riot. Further, the Wheeler rule encourages the use of discriminatory challenges to force an opponent to disqualify an otherwise favorable venire.

Only this court can modify the remedy it created in Wheeler to prevent the exclusion of a juror on the basis of race... [which] is a violation of the juror's constitutional rights. Holland v. Illinois (1990) 493 U.S. 474, 488, 107 L.Ed.2d 905, 110 S.Ct. 803 (concurring opinion). The Court of Appeal below, citing another appellate decision, held at p.4. of its opinion that ""until the United States Supreme Court mandates a contrary remedy, or the California Supreme Court changes its mind,

we have no option but to follow the Wheeler remedy.'"

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III
STATEMENT OF THE CASE

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During jury selection, defendants applied four of their five peremptory 5 challenges to exclude hispanic and black jurors. An irritated trial court offered to strike the entire venire[11], granting the remedy prescribed by this court in Wheeler. The Lozanos requested the court to follow

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[1] RT1610:10-20:

MR. M. PADWAY [Plaintiffs' attorney]: The California rule appears to be that the only remedy that the court has is to call a new panel. The--

THE COURT: Which I offered to do. Let the record speak to that.

MR. M. PADWAY: I was afraid of that. The federal courts allow a particular challenge to be denied. I -- I don't see that -- unless your Honor is interested in changing California law -- that -- that you have that option...

THE COURT: I-- I'm not prepared.

instead the federal rule and merely deny the discriminatory challenges. Bound by Wheeler, the court could not simply disallow the discriminatory challenges. The Lozanos declined the offered new venire, and the racially skewed jury decided the case.

The Lozanos were thus given two options. They could allow these well- financed defendants to continue their racial discrimination on venire after venire until by chance they selected a venire of their liking.[22] Or, the Lozanos could try the case before a 6 racially skewed jury. Both options reward the defendants for racially discriminatory conduct.

****

CONCLUSION

One young child burned to death, and a second barely survived with burns over the majority of her body. The jury must be allowed its historic role in determining whether this tragedy was caused by the defendants' negligence. And the community

[2] The Wheeler rule also leads to multiple mistrials when counsel refuses to desist from exercising racially discriminatory challenges. *People v. Williams* (1994) 26 Cal. App. 4th Supp. 1.

needs to know that the jury is a fair and impartial one.

The case must be retried before a fair and impartial jury, under the law of negligence.

SUPPLEMENTAL APPENDIX C
APPELLANTS OPENING BRIEF IN THE CALIFORNIA COURT OF APPEAL

6

4. Jury Selection

Jury selection began May 28, 1996. RT 1310. Defendants exercised 5 peremptory challenges, four of which excluded hispanic or black prospective jurors. RT 1536 1537, 1540, 1598, 1599. The Lozanos complained that the challenges were exercised on the basis of race. The court impliedly agreed and offered to strike the venire and start over. RT 1539, 1540, 1598, 1599 and 1602 1613. The Lozanos declined the new panel, requesting instead that the court deny the use of the discriminatory challenge. RT 1610. The Lozanos acknowledged that California law provides for a new panel, but nevertheless argued for the federal remedy, which provides for denial of the challenge. The Lozanos did not wish to challenge the entire venire, and the court allowed the discriminatory challenges to stand. RT 1610, 1613, 1662.

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19

3. **The California Rule Regarding Discriminatory Use Of Peremptory Challenges Should Be**

Changed To Follow The Federal Rule.

The trial court impliedly found that defendants had exercised peremptory challenges in a racially discriminatory manner and offered the remedy allowed under *People v. Wheeler* (1978) 22 Cal. 3d 258 at 292, which is to dismiss the entire venire and start over. This remedy, however, encourages a party to use discriminatory challenges whenever it is

dissatisfied with the venire. Further, it violates the constitutional right of a fit juror to serve. United States v. DeGross (9th Cir. 1992) 960 F. 2d 1433, 1438, 1443. And it leads to multiple mistrials as discriminatory challenges continue. People v. Williams (1994) 26 Cal. App. 4th Supp. 1. It allows a party to push to the limit, and if a party goes beyond, the slate is merely wiped clean and the parties start over. A better approach, and the only one which honors the constitutional rights of the challenged jurors, is the federal one, where the discriminatory challenge is simply disallowed, and the juror seated. The Lozanos requested this latter remedy but recognized that it was not permitted under current California law.

Wheeler itself did not foreclose the use of the federal procedure for all time. After establishing the rule that the entire venire be dismissed, it noted [i]f experience should proves otherwise, it will be time enough then to consider alternative penalties. 22 Cal. 3d at 282, footnote 29.

The court in People v. Smith (1993) 21 Cal. App. 4th 342 noted that dismissal of the entire venire is the only remedy authorized until the California Supreme Court changes its mind. Notwithstanding, in *People v. Williams, supra,* the federal procedure was followed and affirmed under unique circumstances. The rationale of Williams was that the complaining

party did not insist on dismissal of the entire venire, and the peremptory challenges were made initially outside the presence of the jury so that the jurors subject to the discriminatory challenges were not seated knowing they had been challenged. The same facts are true in the case at bar. The Lozanos, the complaining party, specifically requested denial of the challenge instead of dismissal of the panel, and the peremptory challenges were heard in chambers initially so that this remedy could have been employed without seating

jurors who knew that they had been challenged.

It is time to modify the remedy in Wheeler, and Williams provides an appropriate alternative procedure.

Error in the composition of the jury is reversible per se. See, Wheeler at 283. The judgment below should be reversed because of the use of discriminatory challenges.

IV CONCLUSION

The trial court effectively and erroneously non suited Lozanos on negligence. The court expressly and erroneously nonsuited Lozanos on the seat belt defect. And the court allowed discrimination in the jury selection process.

SUPPLEMENTAL APPENDIX D
APPELLANTS' REPLY BRIEF IN THE CALIFORNIA COURT OF APPEAL

3

4

Moreover, argues Toyota, the Lozanos failed to establish a **prima facie** case, either of liability for a defective seat belt or of Toyota's improper use of its peremptory challenges during jury selection, and that they failed to create an appealable record vis-a-vis the latter. The Lozanos will demonstrate below that none of Toyota's arguments has merit, and further that:

(a) Toyota's "Statement of the Case" (RB 3) improperly views the evidence in the light most favorable to Toyota, whereas this court must base its decision upon the evidence most favorable to the Lozanos;

(b) The consumer expectations test creates a question of fact regarding the failure of the seat belt to release Elisa Lozano from the fire; and

(c) The Lozanos properly raised and preserved their contention that this court

should reverse because of Toyota's unconstitutional use of its peremptory challenges.

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27

V THE LOZANOS MADE BOTH A PRIMA FACIE CASE AND AN ADEQUATE RECORD REGARDING TOYOTAS' USE OF DISCRIMINATORY CHALLENGES

Toyota complains that the Lozanos did not move for a mistrial following Toyota's exercise of its peremptory jury challenges in a racially discriminatory manner. But the Lozanos did not do so because they did not desire the only remedy which existing California law authorized the trial court to provide-- namely, striking the venire and starting over. The colloquy was as follows (RT 1610:10 20):

> MR. M. PADWAY: Plaintiffs' attorney] The California rule appears to be that the only remedy that the court has is to call a new panel. The --
>
> THE COURT: Which I

> offered to do. Let the record speak to that.
>
> MR. M. PADWAY: I was afraid of that. The federal courts allow a particular challenge 'to be denied. I -- I don't see that -- unless your Honor is interested in changing California law -- that -- that you have that option...
>
> THE COURT: I-- I'm not prepared.

And, at 1612:28-1613:4:

> MR. LAZARUS [Defendants' attorney]: Then, your Honor, let me --
>
> 28
>
> MR. LAZARUS: -- make it clear that our position would be that he's got the opportunity to cure any problem right now by getting a new panel in here.

And at 1613:8-9:

> THE COURT: I'm prepared to, you know, dismiss these people and call in a new panel.

A party who objects to the other party's use of peremptory challenges must satisfy the court that he has established a prima facie case of misuse of those challenges. People v. Fuentes (1991) 54 Cal.3d 707, 715. However, when the court inquires about the justifications for those challenges, the court has made 'at least an implied finding' of a prima facie showing at 716. People v. Sims (1993) 5 Cal. 4th 405, 428; People v. Johnson (1989) 47 Cal. 3d 1194, 1217. The court then must determine whether or not the other party's justifications suffice. If they do' not, the court then must dismiss the jurors thus far selected, and draw a different venire. People v. Wheeler (1978) 22 Cal.3d 258,282.

Here, of course, the court went much further than merely inquiring about Toyota's justifications. Thus, the court actually offered to grant the mistrial and start over with a new

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venire. And Toyota's counsel not only raised no objection, but acquiesced in the decision, thereby conceding the issue.

The record adequately documents the discrimination, and the court should proceed to the real issue -- whether or not California should adopt the federal rule and allow trial judges to deny individual discriminatory challenges.

VI CONCLUSION

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This court should reverse the judgment because it should adopt the federal rule and allow the trial court to deny the use of facially discriminatory challenges.

SUPPLEMENTAL APPENDIX E
RESPONDENTS' BRIEF IN THE CALIFORNIA COURT OF APPEAL

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complained, but declined "to make a motion which would in any way result in a difference in the composition of the jury panel." Plaintiffs did not request that the challenge be denied, and they advised the court that it was appropriate to proceed. Defendants denied any discrimination, but also noted that they had no obligation to respond because Plaintiffs failed to make any prima facie showing of discrimination. RT 1662-65[6] All told, Defendants exercised three challenges to alternate jurors. RT 1664, 1672, 1709[7]

Footnotes

[6] At this point, Plaintiffs took a new tact and asked the Court to schedule a hearing and hold Defendants in contempt. RT 1662-64 The Court declined.

[7] Plaintiffs state that Defendants exercised five challenges and excluded four hispanic or black jurors. AOB 6 The record does not reflect the ethnicity of the four jurors who were excused without any objection. Plaintiffs failed to include the juror questionnaires in the record.

SUPPLEMENTAL APPENDIX F
RESPONDENTS' ANSWER TO PETITION FOR REVIEW IN THE CALIFORNIA SUPREME COURT

II.
RESTATEMENT OF THE ISSUES

On this record, the issues stated in the Petition should be restated as follows:

(1) Should this Court use this unpublished opinion to reexamine the appropriate range of remedies for discriminatory exercise of peremptory challenges, despite the absence of an adequate record due to Plaintiffs' strategic failure to make a *Wheeler* motion in the trial court, and the consequent lack of any finding of discrimination or evidentiary support for such a finding?

(2) Should this Court use this unpublished opinion and this inadequate record to question the constitutionality of the *Wheeler* remedy when that issue was not raised in the trial court or the Court of Appeal?

****

III
BACKGROUND

(1) During the voir dire process, Plaintiffs embarked on a campaign to inhibit Defendants' exercise of peremptory challenges

by threatening a *Wheeler* motion at each strike of a juror who happened to be a member of a minority group, regardless of the juror's ethnicity or the individualized reasons which justified the challenge. (RT 1536, 1598-1600) Just before the panel was to be sworn, out of an abundance of caution and concern for judicial economy, the trial court asked Plaintiffs if they were making the threatened *Wheeler* motion. Plaintiffs deliberated over that question and ultimately declined to make the motion. The trial judge expressly advised Plaintiffs' counsel that he considered any such challenge waived if they declined to make good on their repeated threats. So advised, the Plaintiffs expressly waived the issue and the jury was sworn. (RT 1602-04, 1607-08, 1611-12)

Though Plaintiffs claimed in the trial court, and again on the appeal, that they were inhibited from making the motion because they did not desire the remedy afforded for unconstitutional challenges under California law, they made no effort to create a record to preserve the issue for appellate review. They made no offer of proof describing the facts which supported an inference of discrimination; they did not ask the trial court to require Defendants to justify their challenges; they did not ask the trial court to make a finding that Defendants had discriminated.

Accordingly, Plaintiffs'claim of discrimination on appeal was based entirely on their extreme liberties with the record,[3] including the unsupported assumption that the trial court had (1)found discriminatory conduct, (2) rejected Defendants' unstated (and unrequested) justifications for the challenges, and (3) was prepared to grant the motion without more. The Court of Appeal properly found it inappropriate on this record to entertain Plaintiffs' invitation to modify the law. (Opinion at 3-4).

(2) The second issue purportedly presented in Plaintiffs' Petition — whether the California remedy for *Wheeler* violations is itself a violation of the federal

[3] Those liberties continue. At page 4 of their Petition, Plaintiffs claim that "Defendants applied four of their five peremptory challenges to exclude hispanic and black jurors." They made the same unsupported assertion to the Court of Appeal (AOB 6), which Defendants challenged (RB 38 n. 7). The Court of Appeal's review of the record led them to agree that Defendants had challenged "a Black woman, two Hispanic women, and two whites." (Opinion at 3) Though Plaintiffs filed a Petition for Rehearing of the Court of Appeal decision, they did not challenge the factual statement of the Court of Appeal, which is therefore binding. C.R.C. 29(b).

constitution — was never raised in the trial court or the Court of Appeal. Plaintiffs briefly and vaguely argued that the federal remedial rule was a "better rule", but they never claimed it was unconstitutional. (RT 1610-11)

****

IV
DISCUSSION

A. Plaintiffs Challenge to the Remedies Available for Violation of *Wheeler* Is Improper Because Plaintiffs Failed to Create A Record Demonstrating They Were Entitled To Any Remedy At All

Plaintiffs' criticism of the Court of Appeal's refusal to change the law of remedy applicable to *Wheeler* violations is misguided. Plaintiffs failed to make a *Wheeler* motion in the trial court, and failed to otherwise develop a record which could support a determination that they were entitled to a remedy, or allow a *Wheeler* determination to be meaningfully reviewed.

This Court long ago created an established methodology for raising and adjudicating claims of discrimination in jury selection,

consisting of a formal motion, production of a prima facie case, burden-shifting, justification, and ultimate determination. This procedure is intended both to promote orderly and logical decision-making in the trial court and to develop the necessary record for an appellate court to adequately review the trial court's determinations.

Plaintiffs thwarted that process here. Seeking to inhibit Defendants exercise of their peremptory challenges, Plaintiffs from the outset repeatedly made empty accusations of discrimination and threatened to make a *Wheeler* motion. When the trial court told Plaintiffs to either make their motion or waive it, Plaintiffs chose waiver. Then they resurrected the issue on appeal, using a tortured interpretation of the inadequate [8] record to argue that the trial court had implicitly found that discrimination had occurred and that they were entitled to a remedy.

The Plaintiffs never made their motion and never produced a prima facie case of discrimination. The mere exercise of challenges of minority jurors is itself insufficient to raise an inference and make out a prima facie case, *People v. Alvarez* (1996) 14 Cal.4th 155, *cert. denied* (1997) 118 S. Ct. 94, and it is presumed that peremptory challenges are exercised in a constitutionally valid manner, *People v.*

Turner (1994) 8 Cal.4th 137, 164, *cert. denied* (1995) 514 U.S. 1068. The trial court never made any finding that a prima facie case of discrimination existed. The trial court never asked Defendants to justify their challenges, and obviously never found that Defendants had exercised their challenges in a discriminatory manner. As the Court of Appeal recognized, on this record, addressing Plaintiffs' abstract argument that California law concerning remedies for jury discrimination needs to be changed would be an improper advisory opinion and an act in excess of its jurisdiction.. This Court's limited resources should not be taxed by advisory decisions concerning the adequacy of a remedy for a motion never made, never decided by the Court of Appeal, and without record support to guide any decision on appeal. Abstract legal issues are not ripe for this Court's review and not a wise use of its time.

Plaintiffs' claim they were inhibited from making the motion and developing the necessary record by the inadequacy of the available remedy. But if Plaintiffs wanted to preserve [9] the panel selected and still make their record in support of lobbying for change in the California remedial scheme, they could easily have done so. Nothing prevented Plaintiffs from making their motion, creating their record, and

then objecting to the Court's intended remedy because they considered it legally insufficient, and declining it, or withdrawing their motion under record protest. Or Plaintiffs could have made an offer of proof in an effort to show that they could satisfy their initial burden of establishing a prima facie case of discrimination and asked the trial court to solicit Defendants' justifications for the record, and make advisory findings. Instead, Plaintiffs chose to forego creating the record necessary to properly consider their insidious charges, choosing instead to lie in wait to challenge any adverse verdict. As a result, there is no evidence that Defendants discriminated, no remedial issue ripe for review, and no reason to use this unpublished opinion to reexamine California law, as Plaintiffs request.

(Any footnotes trail end of each document)

COMMONWEALTH OF PENNSYLVANIA, Appellee vs. JOHN HILL, Appellant

No. 2542 Philadelphia 1997

SUPERIOR COURT OF PENNSYLVANIA

July 14, 1998, Argued
March 8, 1999, Filed

COUNSEL: Thomas R. Quinn, Philadelphia, for appellant.

Jonathan W. Hugg, Assistant District Attorney, Philadelphia, for Commonwealth, Appellee.

JUDGES: BEFORE: KELLY, JOYCE, JJ. and CERCONE, P.J.E. OPINION BY KELLY, J.

OPINIONBY: KELLY

OPINION:

OPINION BY KELLY, J.:

Filed March 8, 1999

Appellant, John Hill, asks us to determine whether a trial court is required, under Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), to recall and seat

venirepersons who have been excused through the use of peremptory challenges. We hold that a trial court has the discretion to fashion a remedy for properly sustained Batson objections, which, depending on the circumstances of the case, may involve calling additional jurors to the venire, granting additional challenges, seating the challenged jurors; or beginning a new jury selection. Accordingly, we affirm.

The relevant facts and procedural history of this appeal are as follows. On May 26, 1996, Appellant and an accomplice approached the victim outside his car in the McDonalds' parking lot, located at 4200 Broad Street in Philadelphia. While his accomplice brandished a gun, Appellant demanded money from the victim and threatened to kill him if he did not comply. The victim told Appellant that he had no money. Appellant grabbed the victim's keys. Appellant and his accomplice persisted in their demands. The victim finally gave twenty dollars to each of them. Appellant's accomplice then grabbed the victim's wallet and Appellant grabbed his jacket and searched through it. A struggle ensued and the victim kicked Appellant's accomplice in the chest and face, at which point he released the wallet and both Appellant and the accomplice fled. Police arrived and chased Appellant and his accomplice. Appellant and his accomplice were arrested.

Additionally, the trial court opinion provides the following facts:

> On December 3, 1996, jury selection in the trial of [Appellant], John Hill, and a co-defendant commenced. A panel of fifty venire persons were brought to the courtroom for voir dire. Because there were two defendants, each defendant was originally

given four peremptory challenges and the Commonwealth received eight peremptory challenges. Initially, fourteen prospective jurors were seated in the jury box, and questioned individually. After the questioning was completed, the court and counsel conferred outside the hearing of the panel and discussed which venire persons should be excused for cause. Five panelists were excused. Of the remaining nine, the Commonwealth exercised its preemptory challenges as to three of them, Jurors No. 3, 12 and 14. The defense struck one. Of the first fourteen, five were seated on the jury.

Subsequent to the dismissal of the stricken jurors, defense counsel raised an objection, pursuant to Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), stating that both [defense] lawyers believed the Commonwealth was exercising its challenges in a discriminatory manner, as the three stricken venire persons were all [African-American] women. It should be noted at the outset that [within] the pool of fifty potential jurors, thirty-four were female. There is no indication in the court record as to the racial composition of the group. The prosecuting attorney stated his reasons for striking each of the panelists. The court found his reason for striking Juror No. 3 to be valid and non-discriminatory. The court also found his reasons for striking Jurors No. [**4] 12 and 14 to be suspect. Because fewer than half

> the needed jurors had yet been selected, the court, within its sound discretion, chose to remedy any possible prejudice by granting the defense an additional peremptory strike, instead of granting the defense request to recall the two jurors who had already been excused from the room. The record reflects that the final racial composition of the jury was six [African-American] jurors and six white jurors. Of the two alternates, one was white and one was [African American]. A review of their names reflects that the final panel consisted of eleven women and one man, and both alternates were women. Of the remaining panelists questioned, the Commonwealth struck only two more jurors, while the defense exercised an additional eight strikes.

(Trial Court Opinion, January 28, 1998 at 1-3.) The jury convicted Appellant of robbery[1] and criminal conspiracy.[2] Appellant now appeals from his judgment of sentence.

Appellant raises the following issue for our review:

> DID THE LOWER COURT ERR IN REFUSING A DEFENSE REQUEST TO SEAT TWO JURORS WHOM THE COURT FOUND TO HAVE BEEN PEREMPTORILY CHALLENGED IN A DISCRIMINATORY MANNER BY THE PROSECUTOR?

(Appellant's Brief at 3).

Appellant makes two arguments on appeal. He claims that the Commonwealth intentionally exercised peremptory challenges to exclude two African-American females from the juror pool on account of race and/or gender in violation of Batson, supra. Appellant also asserts that the trial court abused its discretion when it later refused to seat the two venirepersons who had already been excused because this refusal was improper and inconsistent with the goals of Batson, supra. Therefore, Appellant concludes, he is entitled to a new trial.

In response, the Commonwealth argues that Appellant did not, at the trial level or on appeal, make a prima facie showing of purposeful discrimination in the jury selection process. Moreover, the Commonwealth contends, the trial court gave Appellant a suitable remedy within the court's discretion. Thus, the Commonwealth concludes, Appellant's judgment of sentence should not be disturbed. We agree.

Pennsylvania law makes clear that the Batson rationale applies in cases involving claims of gender-based as well as race-based exclusion in the jury selection/elimination process. See Commonwealth v. Clark, 551 Pa. 258, 710 A.2d 31 (1998); Commonwealth v. Jones, 542 Pa. 464, 668 A.2d 491 (1995), cert. denied, 519 U.S. 826, 117 S. Ct. 89, 136 L. Ed. 2d 45 (1996). Applying the rationale of Batson to a claim of purposeful discrimination based on race and/or gender, Pennsylvania law requires the following:

> To establish...a [prima facie] case, a defendant must show that he is of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race.

> Second, the defendant is entitled to rely on the fact...that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude venirepersons for the petit jury on account of their race. This combination of factors in the empanelling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination.

Clark, supra at 279, 710 A.2d at 41 (citations omitted) (emphasis added). In the context of peremptory challenges, Pennsylvania law further requires the defendant, in his or her prima facie case, to make a record specifically identifying:

> the race or gender of all venirepersons in the jury pools;the race or gender of all venirepersons remaining after challenges for cause;the race or gender of those removed by the prosecutor; and,the race or gender of the jurors who served and the [race or] gender of jurors acceptable to the Commonwealth who were stricken by the defense.

Commonwealth v. Spence, 534 Pa. 233, 627 A.2d 1176 (1993). After such a record is established, the trial court must consider the totality of the circumstances to determine whether the defendant has made a prima facie case of purposeful discrimination. Commonwealth v. Thomas, 552

Pa. 621, 717 A.2d 468 (1998); Commonwealth v. Rico, 551 Pa. 526, 711 A.2d 990 (1998) (citing Jones, supra). The striking of a number of individuals belonging to some cognizable group, alone, is not dispositive of a Batson violation. Rico, supra (citing Commonwealth v. Abu-Jamal, 521 Pa. 188, 555 A.2d 846 (1989), cert. denied, 498 U.S. 881, 111 S. Ct. 215, 112 L. Ed. 2d 175 (1990)). See also Commonwealth v. Simmons, 541 Pa. 211, 662 A.2d 621 (1995), cert. denied, 516 U.S. 1128, 116 S. Ct. 945, 133 L. Ed. 2d 870 (1996) (citing Commonwealth v. Wilson, 538 Pa. 485, 649 A.2d 435 (1994), cert. denied, 516 U.S. 850, 116 S. Ct. 145, 133 L. Ed. 2d 91 (1995) ("standing alone, fact that prosecutor used 10 to 12 challenges to exclude [African-American] persons from jury was insufficient to establish a Batson violation")); Commonwealth v. Jackson, 385 Pa. Super. 401, 561 A.2d 335 (Pa.Super. 1989), affirmed, 526 Pa. 294, 585 A.2d 1001 (1991) (no per se rule that prima facie case exists if prosecutor uses peremptory challenge to strike [African-American] individuals).[3]

If, after considering the totality of the circumstances, the trial court determines that a defendant has established a prima facie case of purposeful discrimination, the court may then ask the prosecutor to explain the basis for the strike. Simmons, supra. Thus, the burden of production shifts to the Commonwealth only after the defendant has made a prima facie showing of intentional race and/or gender discrimination. Id. (citing Batson, supra at 97, 106 S. Ct. at 1723, 90 L. Ed. 2d at 88). Only then should the prosecutor be required to articulate a race or gender neutral reason for its challenges. Thomas, supra; Commonwealth v. Hardcastle, 549 Pa. 450, 701 A.2d 541 (1997). "The reasons for the challenge need not rise to the level of a 'for cause' challenge."

See Rico, supra (citing Jones, supra at 520 n. 31, 668 A.2d at 519 n.31).

In the instant case, Appellant failed to create an adequate record at the trial level as required by Spence, supra, in that Appellant did not make a record of the race/gender of all (1) venirepersons in the jury pool; (2) venirepersons removed by the Commonwealth; (3) venirepersons remaining after strikes for cause; or, (4) jurors who were acceptable to the Commonwealth but were peremptorily stricken by the defense. Appellant's record on appeal is also flawed as Appellant presumes the adequacy of his Batson claim. For the following reasons, we conclude that Appellant presumption is erroneous.

Here, the first round of the voir dire in Appellant's case consisted of fourteen venirepersons. The Commonwealth used its peremptory challenges to strike venirepersons Nos. 3, 12, and 14. Appellant objected to the Commonwealth's peremptory strikes after the fourteen venirepersons had been questioned, after the specific venirepersons had been excused and had already left the room, and before less than half of the jury had been chosen. More importantly, Appellant objected on the sole basis that the stricken jurors were African American females. Appellant presented no other relevant facts and circumstances to raise a legitimate inference that the prosecutor had sought to exclude these venirepersons from the petit jury on account of their race and/or gender. See Batson, supra (looking at a "pattern of strikes" and the prosecutor's questions and statements during voir dire as examples illustrative of facts and circumstances that may be used to support or refute an inference of discriminatory purpose).

On appeal, the only part of the voir dire transcript provided in the certified record is the transcript for venirepersons No.12 through No.14. Appellant did not provide us with the voir dire transcript for the remaining forty-one prospective jurors. Additionally, the transcript available gives no indication from the prosecutor's questions or comments that he was trying to manipulate the composition of the jury by race or gender. Also, Appellant's Batson claim was made very early in the jury selection process, when only five jurors were seated. Under the circumstances of this case, the trial court's response to Appellant's Batson claim was premature, albeit prompt and made in an effort to take corrective action before jury selection was completed. See Rico, supra. Nevertheless, we emphasize the necessity of a prima facie showing before any party is entitled to an explanation for a peremptory strike. See Thomas, supra; Rico, supra. Thus, we conclude that the trial court erred when it immediately required the Commonwealth to give reasons for its peremptory strikes because, without more, Appellant had not yet made a prima facie showing of discriminatory intent.[4] Therefore, the Commonwealth should not have been required, at that time, to give neutral reasons for its strikes. See id. Accordingly, the record does not adequately support the trial court's action in this matter.

Moreover, our independent review of the record provided on appeal shows nothing to indicate that this case was particularly race or gender sensitive. [5]

See Commonwealth v. Garrett, 456 Pa. Super. 60, 689 A.2d 912 (Pa.Super. 1997), appeal denied, 549 Pa. 712, 701 A.2d 575 (1997) (reiterating that race of victim and race of defendant are factors to consider in determining whether party established prima facie Batson case.) From the voir dire sheets contained in the certified record as well as a list of the

names of the forty-two venirepersons questioned, we can discern that at least twenty-nine of the first forty-two persons listed (approximately 69%) were females.[6] Thus, the disproportionate number of females in the jury pool could alone account for the number of females stricken. We are completely unable to identify the venire members by race. There may also have been a disparate number of African Americans in the jury pool. See Thomas, supra (noting that, at time of Batson challenge, all but one of the prospective jurors questioned had been African American). According to the record, however, the final jury included six African-American persons and one African-American alternate. Also, the final jury consisted of eleven females and one male; both of the alternates were female. See Clark, supra (stating that final composition of empanelled jury entitled to some weight on review of Batson claim). Considering all of the information gleaned from the certified record, we conclude that the record available simply does not legitimize Appellant's Batson challenge on the basis of race or gender. See Jones, supra (conducting independent review of record to determine merit of Batson challenge).

With respect to the trial court's decision to give additional peremptory strikes to the defendants, we recognize that the remedy for a legitimate Batson claim is a matter within the discretion of the trial court. Batson, supra at 476 U.S. at 99 n.24, 106 S. Ct. at 1725 n. 24, 90 L. Ed. 2d at 90 n. 24 (making no attempt to instruct state and federal courts how best to implement Batson holding). See also McCrory v. Henderson, 82 F.3d 1243, 1247 (2nd Cir. 1996) (citing Batson); Koo v. McBride, 124 F.3d 869, 873 (7th Cir. 1997) (stating that state courts are to be accorded significant latitude in fashioning Batson remedy).

In the instant case, the trial court had already excused the stricken venirepersons who then left the room before Appellant made his Batson claim. Once these venirepersons had left the room, they were beyond the supervision of the trial court. See generally Commonwealth v. Kerpan, 508 Pa. 418, 498 A.2d 829 (1985) (holding that trial courts must guard against premature discussions among jurors). Refusing Appellant's request to recall and seat these specific venirepersons, the trial court acted to safeguard the integrity of the judicial process as a whole.

Mindful of the varying jury selection methods at the trial level, see Batson, supra, we hold that the remedy for properly sustained Batson objections lies within the sound discretion of the trial court and will not be disturbed on appeal, absent an abuse of that discretion. Such remedy may involve, among other things, calling additional jurors to the venire, granting additional challenges, seating the challenged jurors; or beginning a new jury selection. The trial court's discretion will not be disturbed especially when the challenged venirepersons have already been excused. Thus, the trial court's chosen remedy in this case of giving the defendants additional peremptory challenges, was within its discretion and will not be gainsaid on appeal.[7] Accordingly, we affirm Appellant's judgment of sentence.

Judgment of sentence affirmed.

----------Footnotes----------

n1 18 Pa.C.S.A. § 3701.

n2 18 Pa.C.S.A. § 903.

n3 The trial court relies on Commonwealth v. Dinwiddie, 529 Pa. 66, 601 A.2d 1216 (1992) (plurality), where the exercise of five of six peremptory challenges against African-American venirepersons sufficed to established a prima facie Batson showing. In Dinwiddie, there were other factors to support the Court's decision. Moreover, the subsequent binding authority of Rico, supra, Simmons, supra, and Wilson, supra hold differently. Thus, we follow the subsequent binding precedent.

n4 We note that there was no explicit finding by the trial court that Appellant had made a prima facie Batson showing. We have only the trial court's apparent dissatisfaction with the Commonwealth's reasons for its peremptory strikes. It appears that, in an abundance of caution, the trial court granted the defense additional peremptory challenges, knowing that venirepersons Nos. 12 and 14 had already been dismissed. We do not construe the trial court's remedy as dispositive of either a prima facie showing by the defense or any purposeful discriminatory selection by the Commonwealth.

n5 The only information of record is that Appellant is an African American and the victim is possibly Asian.

n6 The number of females in the group may be higher because some of the names listed can be either male or female names. Thus, we are unable to determine an exact number according to gender. X

n7 We disagree with Appellant's contention, relying on Powers v. Ohio, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991), that the trial court was compelled to seat venirepersons Nos. 12 and 14 to protect their rights to

participate in the judicial process. (See Appellant's Brief at 8.) Powers held that, under the Equal Protection Clause, a criminal defendant may object to race-based exclusions of jurors through the use of peremptory challenges regardless of whether the defendant and the excluded jurors share the same race. Id. Powers emphasizes the right of individual persons not to be excluded from a jury on account of race or gender. However, Powers does not hold so broadly that an individual venireperson has the right to sit on any particular petit jury. Accordingly, Powers does not compel the specific relief Appellant requests. N

State of Ohio, Plaintiff-Appellee, v. DePaul Holloway, Defendant-Appellant.

No. 97APA05-622

COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY

September 17, 1998, Rendered

COUNSEL: Ronald J. O'Brien, Prosecuting Attorney, and Steven L. Taylor, for appellee.

Carol A. Wright, for appellant.

JUDGES: BOWMAN and MASON, JJ., concur. LAZARUS, J., concurs separately.

OPINION: (REGULAR CALENDAR)

OPINION

PER CURIAM

Defendant-appellant, DePaul Holloway, appeals from a judgment of conviction in the Franklin County Court of Common Pleas for aggravated murder in violation of R.C. 2903.01, aggravated robbery in violation of R.C. 2911.01, and having a weapon under disability in violation of R.C. 2923.13. The aggravated murder count contained a death penalty specification, pursuant to R.C. 2929.07(A) (7), that the offense was committed while the offender was

committing, attempting to commit, or fleeing immediately after committing aggravated robbery. The aggravated robbery and weapons under disability counts contained specifications that appellant had previously been convicted of a felony. The weapons under disability count also contained a physical harm specification.

In accordance with the recommendation of the jury, appellant was sentenced to life imprisonment without the possibility of parole for thirty years. Appellant appeals, assigning as error the following:

"ASSIGNMENT OF ERROR 1:

"THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN FAILING TO GRANT A CONTINUANCE OF THE TRIAL IN LIGHT OF THE NEED FOR ADDITIONAL TIME TO PREPARE FOR DNA EVIDENCE. THIS ERROR DENIED APPELLANT HIS RIGHTS TO A FAIR TRIAL AND THE EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE U.S. AND OHIO CONSTITUTIONS.

"ASSIGNMENT OF ERROR NO. 2:

"THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT IN FAILING TO SUSTAIN THE MOTION TO SUPPRESS THEREBY VIOLATING APPELLANT'S CONSTITUTIONAL RIGHTS AS SET FORTH IN MIRANDA V.

ARIZONA (1966), 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602.

"ASSIGNMENT OF ERROR 3:

"THE TRIAL COURT ERRED IN APPLYING BATSON V. KENTUCKY BY MANIPULATING THE JURY TO ENSURE THAT THE FIRST TWELVE JURORS WERE NOT ALL CAUCASIANS AND BY FINDING THAT THE STATE'S BATSON CHALLENGE COULD BE REMEDIED BY GRANTING THE STATE AN ADDITIONAL PEREMPTORY CHALLENGE TO THE ALTERNATE JURORS.

"ASSIGNMENT OF ERROR 4:

"THE TRIAL COURT ERRED IN FAILING TO GRANT THE MOTION FOR JUDGMENT OF ACQUITTAL, PURSUANT TO CRIM.R. 29 AS THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THAT DEPAUL HOLLOWAY KILLED FRANK ROILTON AND SPECIFICALLY, THAT HE KILLED ROILTON, AS SET FORTH IN THE R.C. 2929.04(A)(7) SPECIFICATION.

"ASSIGNMENT OF ERROR 5:

"THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT IN ADMITTING BLOOD SAMPLES,

CLOTHING, AND MATERIALS USED BY SYLVIA ACTION AND DEBORAH LAMBOURNE BECAUSE THE STATE FAILED TO MAINTAIN AND ESTABLISH THE CHAIN OF EVIDENCE.

"ASSIGNMENT OF ERROR 6:

"THE TRIAL COURT ERRED IN ADMITTING THE FILA SHOES AND THE EVIDENCE RELATING TO THE FILA SHOES AS THERE WAS NO EVIDENCE THAT THE SHOES BELONGED TO DEPAUL HOLLOWAY. THE PREJUDICIAL VALUE OF THIS EVIDENCE FAR OUTWEIGHED ANY PROBATIVE VALUE."

On November 22, 1995, appellant and his wife, Roberta Holloway, visited the victim, Frank Roilton, and his girlfriend, Karen Lawson, at Lawson's home. Frank Roilton left the home of his girlfriend in the company of appellant and his wife, and never returned home. On the morning of November 24, 1995, Lawson filed a missing person report. Later that day, the body of Frank Roilton was found in a trash container in the vicinity of appellant's home.

Upon his arrest on another matter, appellant was found with Roilton's wallet and other personal items in his possession. Appellant also was wearing a pair of jeans that were later discovered to contain the blood of the victim.

The case proceeded to a jury trial. During the initial voir dire, the trial court became concerned that the first prospective

jurors that would be seated for general voir dire would all be white. The trial court feared that, if jury seating were done in the order of death qualification, "we're going to have a jury of all white Caucasians which is going to pose some Batson[1] problems." (Tr. 332.)

In an effort to remedy this perceived problem, the trial court proposed that, after death qualification, the jury commissioner scramble the juror questionnaires and draw names randomly. Eventually, however, the parties and the court agreed that the scrambling procedure was unnecessary and, therefore, it was not carried out.

During jury selection, the defense exercised all six of its peremptory challenges to strike white males from the panel. The state used four of its peremptories to strike three white females and one Hispanic female from the panel. The state waived its last two peremptories.

When it came time to select the alternate jurors, the state exercised its first peremptory to strike a black female. The defense struck another white male. At that point, counsel for the state stated:

> "Judge, we would like to point out at this juncture that the first of the two excuses that have been excused that they have so far has been a male white, including their sixth peremptory in the main body of the jury panel." (Tr. 1366.)

At that point, the trial court reviewed all of the peremptory challenges that had taken place and noted: "So every white male they excused you had excused a white female with the

exception of Mrs. Kerestly who, I believe, was Hispanic female." (Tr. 1367.) The trial court then asked the state for its second and final challenge. The state passed and did not exercise its final peremptory. The defense used its final peremptory to strike another white male.

The trial court then asked both sides to state on the record their reasons for striking jurors. After the defense stated its reasons, the trial court stated:

> "The defense, the defense's peremptory challenges one through six and their two alterantes [sic] have all been white males. That does concern me. They have stated their basis for the record. Really, what am I to do? You know, this is just for appellate purpose, it's not that I can call these people back and tell them that they're back on. I'm not allowed to do that." (Tr. 1378.)

The trial court asked the state whether it wished to object, and the state objected, "particularly to these last two on the alternates." (Tr. 1379.)

The trial court then asked the state to give its reasons for exercising its peremptories. After the state did so, the defense did not raise any objection pursuant to Batson v. Kentucky (1986), 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69, or ask for a remedy. The state, however, requested that the trial court reinstate the last juror the defense challenged. The following exchange occurred:

> "THE COURT: Now, let's talk about the alternates, if we're going to need to remedy

that situation. The State forfeited their last one on the two alternate peremptories. I would think that if you had a problem with Mary Scott, Lynn Koch, or William Pearl, or Kirk Becker, we could have done that. However, though I do think we're feeling that right away, we have to do it in systematic order so you don't just jump over Marilyn Scott down on to one of the two males. What are you requesting of the Court on alternates, Mr. Ellis?

"MR. ELLIS [Assistant Prosecutor]: Well, I would like to see Mr. Thompson reinstated. I think that they have not given a valid excuse concerning his removal, and we have excused one, they have excused Mr. Scheiderer, that if that's a valid reason, then that's fine, but I don't see that they have indicated a valid reason for Mr. Thompson being excused.

" ***

"THE COURT: Well, the law is clear, is that if the record demonstrates that a systematic exclusion of jurors based upon their race is what Batson is about. There's a case that applies to civil cases as well, then also there's a situation where it's applied to gender.
"Here we have just got a pretty much equal, we have males being excluded by the defense, white females being excluded by the State.

"MR. ANDERSON [Defense Counsel]: And quite frankly, I didn't get the impression that there was any systematic exclusion of any one demographic group here. The first time I was aware of that was when I was brought into this room.

"THE COURT: Though we have all agreed there's nothing we can do about the main twelve was the point.

"MR. ELLIS: We're not asking you to do anything about the main twelve.

"THE COURT: Now, all we're talking about is the alternates. All you are asking for is Mr. Thompson to be excused, your challenge, the challenge.

"MR. ELLIS: Yeah.

"MR. SWOPE [Defense Counsel]: I have one other thing to say. My client and I've been talking about Mr. Thompson. He was very uncomfortable with Mr. Thompson. He said that, indicated that I think before we even did this when we were going to do the initial voir dire, this man concerned him. You know, it's his life, I think he's got a right to put some input into it as well.

"THE COURT: Mr. Ellis, you had passed. Of course, nothing is engraved in stone on the alternates yet, but you passed the second

alternate. Did you wish to exercise that and, of course, if we're going to do them the way we're doing them, that would bump off Marilyn Scott, and I don't think you mean to do that. So you are going to stand with your decision to pass.

" ***

"MR. ELLIS: Well, if we could exercise our sixth peremptory?

"THE COURT: Sure.

"MR. ELLIS: We will excuse Mr. Pearl.

" ***

"MR. SWOPE: I thought he passed.

"THE COURT: He did, but I'm saying that in light of the fact that we have not had anything engraved in stone yet, no one's been excused, we can't remedy the first twelve. The only thing --

"MR. ELLIS: I guess, what, he's going to allow us to kick Mr. Thompson?

"THE COURT: Okay.

"MR. SWOPE: Okay.

"THE COURT: Okay, So Mr. Pearl will be there.

"MR. SWOPE: We, of course, object to him getting another whack at the apple.

"THE COURT: He's not getting another whack. He's just exercising one that he was originally going to pass before he knew that you were going to exercise Thompson. And I was inclined to go ahead and allow you to excuse Thompson.

"MR. SWOPE: Okay.

"MR. ANDERSON: So this made up the previous mistake they made?

"THE COURT: No. What it is we can't remedy what you have done to the first twelve because they have already been excused and left. We probably should have put the Batson objection for the record before that, so the best I can do now is make it all for the record. Really, I don't know that it's my authority anyway. It's, I think, an appellate decision to say whether or not they have, based upon this policy and this record and these reasons whether or not there was a systematic challenge. I don't think that I'm the one that makes that decision. I think an appellate court is the one.

"MR. CANEPA [Assistant Prosecutor]: Really, the worst remedy, the most stringent remedy would be to start again.

"THE COURT: Start again?

"MR. CANEPA: Obviously, you're not saying we're not going to go that far.

"THE COURT: I don't think so.

"MR. CANEPA: It's an appellate issue.

"THE COURT: I think its an appellate issue on the first twelve because I just don't know what you can do.

" ***

"THE COURT: So Pearl will go. *** " (Tr. 1385-1391.)

We find that the third assignment of error is dispositive of this appeal and limit our discussion to the issues raised therein. As to the third assignment of error, the parties agree that the trial court misunderstood the holding in Batson when it expressed concern that the actual jury panel could end up being composed of all whites. Batson does not create a right to a jury of any particular composition. Phillips v. Value City Dept. Stores, 1997 Ohio App. LEXIS 4208 (Sept. 16, 1997), Franklin App. No. 96APE12-1711, unreported (1997 Opinions 3762, 3771-3772). Rather, in Batson, the United States Supreme Court held that the Equal Protection Clause of the United States Constitution precludes a prosecutor from

using peremptory challenges to exclude potential jurors solely on account of race. Id. at 901, 1719. Batson has since been extended to peremptory challenges by the defense. Georgia v. McCollum (1992), 505 U.S. 42, 112 S. Ct. 2348, 120 L. Ed. 2d 33, and to preclude gender-based peremptory [*12] challenges. J.E.B. v. Alabama ex rel. T.B. (1994), 511 U.S. 127, 114 S. Ct. 1419, 128 L. Ed. 2d 89.

Although the trial court misapplied Batson by attempting to make certain the first twelve jurors were not all white, the trial court did not carry out its proposed plan to scramble the jury questionnaires. Thus, at that point in the trial no actual error occurred, and appellant was not prejudiced.

Subsequently, during selection of the alternate jurors, the state raised a Batson challenge. The trial court never made a finding of purposeful discrimination, apparently erroneously believing that an appellate court had to resolve the issue. In fact, it is the trial court's initial responsibility to determine whether a party has violated the rule articulated in Batson.

The Supreme Court has articulated a three-part process for proving a Batson violation. First, a party must establish a prima facie case of discriminatory purpose. This can be done by pointing to a pattern of challenges against a particular race or gender. Once the opponent of a peremptory challenge has made out a prima facie case of impermissible discrimination, the burden of production shifts to the proponent of the strike to come forward with a race or gender neutral explanation. If a race or gender neutral explanation is tendered, the trial court must then decide whether the opponent of the strike has proved purposeful discrimination. Purkett v. Elem (1995), 514 U.S. 765, 115 S. Ct. 1769, 1770-1771, 131 L. Ed. 2d

834; Batson, supra, 476 U.S. at 98-99, 106 S. Ct. at 1723-1724.

In the event a trial court finds that the use of peremptory challenges has been predicated on an impermissible group affiliation, the trial court has discretion to fashion an appropriate remedy. See id. at 100; 106 S. Ct. at 1725, n. 24. ("In light of the variety of jury selection practices followed in our state and federal trial courts, we make no attempt to instruct these courts how best to implement our holding today.") Remedies may include seating the challenged person on the jury or dismissing the entire panel and selecting a new jury from a panel not previously associated with the case. Id.

Here, the trial court had the parties state their reasons for exercising their peremptory challenges, but never exercised its responsibility to determine from all the evidence whether the defense had engaged in purposeful discrimination. The trial court remarked that it was "concerned" about the defense using all of its peremptories to strike white males and discussed the question of remedy. This raises the possibility that the trial court would have sustained the objection. However, later the trial court indicated that it was "inclined" to allow the defense to exercise its final peremptory to excuse a white male and, in fact, did allow Mr. Thompson to be excused as an alternate. Yet, the trial court permitted the state to exercise a peremptory challenge after having waived its final peremptory. Based on the conflicting remarks and actions of the trial court, we are unable to conclude from the record that the trial court found the Batson challenge meritorious.

Despite the failure to sustain or overrule the Batson challenge, the trial court permitted the state to exercise a

peremptory challenge after it had previously waived its final peremptory challenge. This was a clear violation of Crim.R. 24(D), which provides in pertinent part:

> "(D) Manner of exercising peremptory challenges. Peremptory challenges may be exercised after the minimum number of jurors allowed by the rules has been passed for cause and seated on the panel. Peremptory challenges shall be exercised alternately, with the first challenge exercised by the state. The failure of a party to exercise a peremptory challenge constitutes a waiver of that challenge. If all parties, alternately and in sequence, fail to exercise a peremptory challenge, the joint failure constitutes a waiver of all peremptory challenges."

In Columbus v. Hunt, 1989 Ohio App. LEXIS 1187 (Mar. 30, 1989), Franklin App. No. 88AP-512, unreported (1989 Opinions 1077), this court addressed a nearly identical question. The defendant was charged with operating a motor vehicle while under the influence of alcohol. During selection of the alternate juror the prosecution elected not to exercise a peremptory challenge; however, the defendant exercised his. A second alternate was seated and the prosecution was allowed, over defendant's objection, to exercise a peremptory challenge. Defendant moved for a mistrial, the trial court overruled the motion, and a third alternate was sworn and seated. The alternate juror then replaced one of the jurors originally impaneled. This court held that the trial court erred in allowing the prosecution to exercise an "extra" peremptory challenge in excess of that allowed by the criminal rules. This court also held that, as a matter of law, the defendant was not

required to make a showing of actual prejudice where the state is granted an "extra" peremptory challenge. Id. citing State v. Pryor, 1986 Ohio App. LEXIS 7613 (June 26, 1986), Highland App. No. 595, unreported; State v. Long, 1984 Ohio App. LEXIS 10942 (Sept 28, 1984), Trumbull App. No. 3371, unreported. See, also, State v. Sage, 1983 Ohio App. LEXIS 15736 (Nov. 3, 1983), Franklin App. No. 82AP-983, unreported (1983 Opinions 2822, 2835). ("We hold that defendant is not required to demonstrate the specific manner in which the trial court's refusal to allow him to exercise the number of peremptory challenges to which he was entitled prejudiced him.")

Here, the state had passed on its last challenge. The trial court then granted the state an extra peremptory challenge, and all four alternates eventually replaced regular jurors. Such an additional challenge is clearly in violation of what is allowed by Crim.R. 24(D) and constitutes error. Appellant's third assignment of error is sustained.

Given our disposition of the third assignment of error and the necessity for a retrial with a properly impanelled jury, we need not address the remaining assignments of error and they are overruled as moot.

Accordingly, appellant's third assignment of error is sustained, and the first, second, fourth, fifth, and sixth assignments of error are overruled as moot. The judgment of the Franklin County Court of Common Pleas is reversed, and this cause is remanded to that court for a new trial and for further proceedings in accordance with law and consistent with this opinion.

Judgment reversed and cause remanded.

BOWMAN and MASON, JJ., concur.

LAZARUS, J., concurs separately.

CONCURBY: LAZARUS

CONCUR:

LAZARUS, J., concurring separately.

I agree the case must be reversed and remanded for a new trial because the trial court granted the state an additional peremptory challenge. However, I write separately because I do not believe our disposition of the third assignment of error renders the fourth assignment of error moot.

An issue is moot when a determination can have no practical effect on the existing controversy. Here, a determination that the evidence was insufficient would, in effect, be an acquittal and would bar retrial of the defendant. Burks v. United States (1978), 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1; Greene v. Massey (1978), 437 U.S. 19, 98 S. Ct. 2151, 57 L. Ed. 2d 15. Moreover, a reversal on the basis of insufficiency means that the state's case is so lacking that it should not have even been submitted to the jury. Burks, supra, 437 U.S. at 16, 98 S. Ct. at 2150. Therefore, if we were to find that the evidence was insufficient to establish that appellant killed Frank Roilton, or that he was the principal offender in a robbery resulting in the death of Frank Roilton, retrial would be barred by the Double Jeopardy Clauses of the Ohio and United States Constitutions. State v. Thompkins (1997), 78 Ohio St. 3d 380, 387-388, 678 N.E.2d 541.

Nevertheless, the circumstantial evidence against appellant was strong and clearly sufficient to support the guilty verdicts beyond a reasonable doubt. Therefore, I would sustain the third assignment of error, overrule the fourth assignment of error, and overrule the remaining assignments of error as moot.

----------Footnotes----------

n1 Batson v. Kentucky (1986), 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69.